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Nos. 15256-15257

United States
Court of Appeals
for the Ninth Circuit

MARGUERITE FERRANDO and FRED FERRANDO, co-executors of the Last Will and Testament of Mario Ferrando, deceased;
EDWARD FERRARI and GEORGE FERRARI, co-executors of the Last Will and Testament of Luigi Ferrari, deceased,
Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

In Two Volumes

VOLUME II.

(Pages 33 to 225, inclusive)

Appeal from the United States District Court for the
Northern District of California
Southern Division

FILED

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(Pages 33 to 225, inclusive)

Appeal from the United States District Court for the
Northern District of California
Southern Division

In the United States District Court, Northern
District of California, Southern Division

No. 34,586

MARGUERITE FERRANDO and FRED FER-
RANDO, Co-Executors of the Last Will and
Testament of Mario Ferrando, Deceased,
Plaintiffs,

vs.

UNITED STATES OF AMERICA, Defendant.

No. 34,587

EDWARD FERRARI and GEORGE FERRARI,
Co-Executors of the Last Will and Testament
of Luigi Ferrari, Deceased, Plaintiffs,

vs.

UNITED STATES OF AMERICA, Defendant.

REPORTER'S TRANSCRIPT

Thursday, March 15, 1956

Before: Hon. Louis E. Goodman, Judge.

Appearances: For the Plaintiffs: Henry W.
Howard, Esq., 111 Sutter Street, San Francisco,
California. For the Defendant: Lloyd H. Burke,
U. S. Attorney, by Lynn J. Gillard, Assistant U. S.
Attorney. [1*]

* Page numbers appearing at top of page of original Reporter's
Transcript of Record.

The Clerk: Ferrando versus The United States, Ferrari versus The United States, court trial.

Will respective counsel please state their appearances for the record.

Mr. Howard: Henry W. Howard for the plaintiffs.

Mr. Gillard: Lynn J. Gillard, Assistant United States Attorney for the defendant, United States.

(Opening statements by both counsel.)

FRED FERRANDO

one of the plaintiffs herein, called as a witness in his own behalf; sworn.

The Clerk: Please state your name to the Court.

The Witness: Fred Ferrando.

Direct Examination

Q. (By Mr. Howard): Mr. Ferrando, you are one of the plaintiffs in the proceeding now pending before this Court, is that correct?

A. Yes, sir.

Q. You were a co-executor of the last will and testament of your father, Luigi Ferrari — Mario Ferrando?

A. That's right.

Q. And when did your father die, Mr. Ferrando?

A. April, 1947.

Q. Where were you born, Mr. Ferrando?

A. San Francisco. [3]

Q. When?

A. 1911.

Q. Where were you educated?

A. San Francisco.

Q. Where did you go to grade school?

(Testimony of Fred Ferrando.)

A. Portola.

Q. Did you go to high school?

A. Yes, Mission.

Q. Did you graduate from high school?

A. No, I didn't.

Q. What was your father's business, Mr. Ferrando?

A. Concrete contractor.

Q. And were you engaged in that business with your father?

A. Yes, I was.

Q. You carried it on after his death, is that correct?

A. Yes.

Q. Now, Mr. Ferrando, do you know Lloyd J. Cosgrove?

A. Yes.

Q. Did you know him at the time of your father's death?

A. Yes.

Q. How long had you known him at that time?

A. Approximately eighteen years.

Q. Did you ever have any professional relations with him during that period of time?

A. Yes. [4]

Q. In general what did those consist of?

A. Oh, a few minor court cases that he had, legal cases.

Mr. Gillard: I didn't hear that answer.

The Witness: A few minor legal cases that he had handled for me.

Q. (By Mr. Howard): Did Mr. Cosgrove prepare your father's will?

A. Yes.

Q. Do you know when that occurred, approximately?

(Testimony of Fred Ferrando.)

A. Oh, a few months before my dad passed away.

Q. Now, at the time of your father's death, at any time prior to your father's death, had you ever been named executor or administrator of a last will and testament of anyone? A. Yes.

Q. Other than your father?

A. Oh, no; no.

Q. Had you ever been connected in any way with the probate of estates prior to that time?

A. No.

Q. Now, at the time of your father's death, how soon after the time of your father's death did you contact Mr. Cosgrove? A. Immediately.

Q. Did you go to see him? A. Yes.

Q. Was your mother with you?

A. Yes. [5]

Q. What was the nature of the discussion you had with him at that time?

A. About the estate, my father's estate, to handle the estate for us.

Q. Did you employ him for the purpose of representing you as executors?

A. That is correct.

Q. Did Mr. Cosgrove undertake that employment? A. Yes.

Q. At that time did you have any discussion about taxes and all?

Mr. Gillard: Well, pardon me——

A. Yes.

Mr. Gillard: ——Counsel, I object to the ques-

(Testimony of Fred Ferrando.)

tion as being not specific as to time; like to know when this is.

Q. (By Mr. Howard): When did this conversation take place, Mr. Ferrando?

A. I don't remember; first time I went to see him, I believe.

Q. How soon after the death of your father did that occur?

A. Oh, within a week, a few days.

Q. I see. Now, at the time of that conversation was there any discussion about taxes in connection with the administration of your father's estate?

A. Yes. [6]

Q. Now, what did Mr. Cosgrove ask you to do in connection with the administration of that estate? A. I don't remember.

Q. Did he call on you to furnish documents?

A. Oh, yes.

Q. Did you comply with his request?

A. I did.

Q. Do you remember what they related to, in general? A. To the estate of my father.

Q. Now, Mr. Ferrando, I have here in my hand a letter addressed to you under date of February 8, 1949, by Mr. Lloyd J. Cosgrove, and ask you if you have seen that before?

A. Yes, sir, I have.

Q. Received by you from Mr. Cosgrove, is that correct? A. That is right.

Mr. Howard: May I read this into the record, your Honor?

(Testimony of Fred Ferrando.)

Mr. Gillard: Is it being offered in evidence?

Mr. Howard: Yes. This is a letter from the law office of Cosgrove, Molinari & Tinney. It is dated February 8, 1949 and reads as follows:

“Mr. Fred Ferrando,
815 Thornton Street,
San Francisco, California.

Dear Mr. Ferrando:

The Federal estate tax return has been prepared. I would, therefore, appreciate your [7] calling with your mother at this office to sign it. Please give this matter your usual prompt attention.

Yours very truly,

Lloyd J. Cosgrove.”

Offer this in evidence.

The Clerk: Plaintiff's Exhibit No. 1. Introduced and filed into evidence.

(Letter referred to was thereupon received in evidence and marked Plaintiff's Exhibit 1.)

Q. (By Mr. Howard): Now, Mr. Ferrando, prior to the receipt of that letter had you had any discussions with Mr. Cosgrove with respect to the Federal estate tax return?

A. I believe I did, yes.

Q. Do you remember specifically when?

A. No.

Mr. Gillard: What is that answer?

The Witness: No.

The Court: No, he said.

Q. (By Mr. Howard): In response to that letter did you go to Mr. Cosgrove's office?

(Testimony of Fred Ferrando.)

A. Yes.

Q. And did you sign the Federal estate tax return? A. Yes.

Q. Was your mother present at that time? [8]

A. Yes.

Q. Did she sign the return? A. Yes.

Q. Now, did Mr. Cosgrove indicate to you at that time that the return was late? A. No.

Q. Did he indicate to you at that time that there was any possibility of penalties involved, or anything of that nature? A. No.

Q. Now, Mr. Ferrando, do you recall the payment of the Federal estate tax called for in that return? A. Yes.

Q. And will you tell us how that was handled?

A. I was called to make this check—I believe it was in the amount of around thirteen, fourteen thousand dollars—and which I did, I made the check out.

Q. And when did this occur?

A. I don't remember the date.

Q. Referring to the exhibit just in evidence, the date is February 8, 1949. Does that refresh your recollection with respect to that time?

A. No, it could be that, though.

Q. What is that?

A. It could be that date; I really don't remember the date.

Q. Who asked you to furnish the check? [9]

A. Mr. Cosgrove.

Q. Did he call you personally? A. Yes.

(Testimony of Fred Ferrando.)

Q. Did he ask you to mail the check?

A. No.

Q. What did he say?

A. He told me to make the check out, leave it at my office and send someone out to pick it up.

Q. And the check was then picked up?

A. Yes.

Q. Who picked it up, do you know?

A. I believe Mr. Cosgrove picked it up.

Q. Now, Mr. Ferrando, when did you first have knowledge that this return was filed late and that there was a probability of penalties involved?

A. The day that the Internal Revenue man called me, I believe his name is Mr. Holmes, he called me, and I wasn't there. I got the message and called Mr. Cosgrove. Mr. Cosgrove told me to come down and see him. I saw Mr. Cosgrove, he told me to go see his attorney. That is when I found out about that.

Q. Is that the first time you had any knowledge of those circumstances? A. That's right.

Mr. Howard: Care to cross-examine? [10]

Cross Examination

Q. (By Mr. Gillard): Mr. Ferrando, how long had you been in the concrete business with your father prior to his death?

A. Approximately fifteen years.

Q. That was a partnership, was it?

A. Yes, sir.

Q. What were your duties as a partner?

(Testimony of Fred Ferrando.)

A. I handled everything.

Q. You handled estimating? A. Right.

Q. And bidding on jobs?

A. That is correct.

Q. Ordering of materials? A. Right.

Q. Payment of bills? A. Right.

Q. Running of the office? A. That's right.

Q. Making the tax returns? A. No.

Q. Who made the tax returns?

A. My accountant.

Q. Your who? A. My accountant.

Q. Your accountant. In connection with that business, what [11] kind of taxes, local, State and Federal, were you required to pay?

A. I don't remember.

Q. Don't you remember any of them, Mr. Ferrando? A. You are talking about amounts?

Q. No, the——

The Court: What kind of taxes?

The Witness: Oh, yes, excuse me. State tax, Internal Revenue tax.

Q. (By Mr. Gillard): Well, let's see, you were required to have a City license, weren't you?

A. Oh, yes.

Q. And that had to be renewed annually?

A. Yes.

Q. You knew that was on a yearly basis?

A. Yes.

Q. You had to pay real estate taxes locally?

A. No, not real estate business.

The Court: No, but what he means, did you own

(Testimony of Fred Ferrando.)

any real estate on which you had to pay taxes?

The Witness: Oh, yes; yes, sir.

Q. (By Mr. Gillard): Those are paid annually likewise, aren't they? A. Yes.

Q. Then for the State you had certain withholdings from the [12] wages of your employees, unemployment compensation? A. That's right.

Q. How were those returns made?

A. Well, the girl in the office takes care of all that.

Q. What period of time was the reporting period for the withholding taxes on unemployment for the state?

A. I believe it is quarterly, I think.

Q. That's to the Franchise Tax Commissioner, is it? A. I think so.

Q. Did you pay any other State taxes?

A. No.

Q. State income taxes? A. Oh, yes.

Q. What was the reporting period for State income taxes? A. Yearly.

Q. Yearly. What kind of Federal taxes did you pay? A. Yearly.

Q. Those included social security taxes for employees? A. Yes.

Q. Withholding, wage withholding taxes for the employees? A. I believe so.

Q. And your own income taxes?

A. That's right.

Q. All those were reported annually?

A. Right. [13]

(Testimony of Fred Ferrando.)

Q. So that you are familiar with the fact that with reference to taxes in general there are certain definite periods provided by law that tax returns are to be due, is that correct?

A. Not thoroughly familiar.

Q. Well, with respect to the taxes you have referred to, were you thoroughly familiar with that fact?

A. I know we have those taxes, we have to take care of that, I know.

Q. And you know——

A. But I have very little to do with it. In fact, none at all but sign the check.

Q. You knew the fact that these were taxes which are required to be reported at regular periodic intervals?

A. Yes.

Q. Now, when you went to see Mr. Cosgrove that very first day that you saw him after your father's death, I believe you testified that on that occasion you had talked to him about taxes, is that correct?

A. Yes.

Q. What did you talk about, Mr. Ferrando?

A. Estate tax.

Q. What about the estate tax?

A. Well, I wanted him to handle the, my father's estate, take care of the whole thing.

Q. Well, specifically with reference to estate taxes, what [14] did you talk about?

A. I don't remember.

Q. Did you ask him if an estate tax was going

(Testimony of Fred Ferrando.)

to be required to be paid in connection with this estate?

A. It is pretty hard for me to remember that, sir.

Q. Did you ask him when a return, a tax return would be due in the estate?

A. I don't remember.

Q. Do you have any recollection about that at all, Mr. Ferrando? A. Not too much.

Q. Did you at any time prior to the receipt of Exhibit No. 1 ask Mr. Cosgrove about an estate tax return and when it should be filed in connection with your father's estate?

A. Yes, I believe I asked him, he told me that he would take care of the matter.

Q. When was this and what was it?

A. Matter of my father's estate.

Q. Yes, you asked him to take care of your father's estate, and he said he would take care of it, is that correct? A. That's right.

Q. Did you inquire of anybody else outside of Mr. Cosgrove about your responsibilities to prepare and file an estate tax return with the Internal Revenue Service? A. No, sir, I didn't. [15]

Q. You did not, sir? A. No, sir.

Q. Do you recall at any time it came to your attention that you were required to file an estate tax return fifteen months after your father's death?

A. No, I don't remember; I don't remember.

Q. You don't know? A. That's right.

(Testimony of Fred Ferrando.)

The Court: You must have known that you had to pay taxes on your father's estate.

The Witness: Yes, sir.

The Court: You had that much knowledge?

The Witness: Yes.

The Court: Did the lawyer tell you when you had to pay the tax?

The Witness: Well, I was depending on him, that's why I hired the man.

The Court: But he didn't, did he tell you when you had to pay the taxes?

The Witness: No, he didn't tell me when I had to pay them.

Q. (By Mr. Gillard): In connection with the estate, do you recall that an inheritance tax appraiser was appointed for the purpose of making an inventory of the properties of the estate and placing a value on those properties? [16]

A. That I do.

Q. And do you recall that in that connection an inventory and appraisement were made by an appraiser of the estate?

A. I remember.

Q. And that was filed in connection with the estate?

A. I believe it was.

Q. You signed it also, is that correct?

A. Yes.

Q. I will show you, Mr. Ferrando, file No. 109,-505, in the files of the Superior Court for the State of California, in and for the City and County of San Francisco. I will direct your attention to a document entitled "Inventory and Appraisement,"

(Testimony of Fred Ferrando.)

second page of which contains an oath of appraiser, and the third page of which contains the oath of executors with two names signed to it, one of which is Marguerite Ferrando, and one of which is Fred Ferrando and ask if you will identify that as——

A. Yes.

Q. ——your signature? A. Yes.

Q. That is the inventory and appraisement which was filed at that time in the estate of your father? A. Yes.

Q. Now, what is the date of the notarial acknowledgments on your signature on that inventory and appraisement, Mr. Ferrando? [17]

A. Fourteenth day of October, 1948.

Q. And would you say that is the date upon which it was signed? A. I believe so.

Q. Do you have any recollection that it was signed on any other date except as dated by the notary? A. No.

Q. Now, sir, at that time that that inventory and appraisement was filed, did you inquire of Mr. Cosgrove about the filing of a Federal estate tax return?

A. I don't remember if I—I know this, that I had called him on the telephone and asked him if the estate was finished yet and he said everything is being taken care of. I just left it at that.

Q. I gather in general that your relationships with Mr. Cosgrove in connection with this estate was that you would make inquiries as to how things were coming along, and he would say everything

(Testimony of Fred Ferrando.)

was being taken care of? A. That's right.

Q. You were not aware that at the time this inventory and appraisal was filed that the time for filing of the Federal estate tax return had already expired?

A. No, sir, I wasn't aware of it.

Q. You didn't call that to Mr. Cosgrove's attention nor ask him any questions about it? [18]

A. No, I didn't.

Q. Now, sir, I will ask you——

Mr. Gillard: I will ask this to be marked, this check to be marked for identification.

The Clerk: Defendant's Exhibit A marked for identification.

(Check dated July 15, 1948 in the sum of \$14,525.69 was received and marked Defendant's Exhibit A for identification only.)

Q. (By Mr. Gillard): I will show you Defendant's Exhibit A for identification, Mr. Ferrando, which is a check in the amount of \$14,525.69, and ask you if you can identify that check?

A. Yes, that's my check.

Q. Are the figures I just read in your handwriting? A. Yes, sir.

Q. And the payee, the Collector of Internal Revenue, in your handwriting? A. That's right.

Q. And the signature? A. Correct.

Q. F. Ferrando? A. That's right.

Q. That check bears a typewritten date of July 15, 1948. A. That's right. [19]

Q. Did you insert that date in there, Mr. Fer-

(Testimony of Fred Ferrando.)

rando? A. No, sir, I did not.

Q. When you made out the check you did so at the request of Mr. Cosgrove? A. Yes.

Q. Did Mr. Cosgrove request that you leave the date of the check blank?

A. I don't remember that incident. I remember him telling me to make the check out.

Q. Do you recall why you did not insert the date on the check? A. I don't recall.

Q. Do you know when that check was actually drawn, Mr. Ferrando?

A. Well, the stub on the checkbook will indicate that.

Mr. Gillard: I will ask to be marked for identification this book of check stubs. The only one to which we will have reference will be check No. 8860.

Q. Is the number on that check in front of you on Exhibit A No. 8860, Mr. Ferrando?

A. That's right.

Mr. Gillard: Ask this checkbook stub be marked Exhibit B.

The Clerk: Defendant's Exhibit B marked for identification.

(Checkbook stubs received and marked Defendant's Exhibit B for identification only.)

Q. (By Mr. Gillard): I show you Defendant's Exhibit B for identification, Mr. Ferrando, and refer particularly to and ask you first what is this Exhibit B for identification?

A. This is the stub that belongs to this check.

(Testimony of Fred Ferrando.)

The Court: That's the stubs of your checks, is that correct?

The Witness: That's right.

Q. (By Mr. Gillard): And the entry made opposite check No. 8860 is that in your handwriting, sir? A. Yes, sir.

Q. Was that made on the date you wrote the check? A. Right.

Q. What date is the entry on your check stub record? A. February 17, 1949.

Mr. Gillard: I will offer into evidence Exhibits A and B, if the Court please.

The Court: Admitted.

(Defendant's Exhibits A and B heretofore marked for identification only, were received and marked in evidence.)

Q. (By Mr. Gillard): Now, do I gather the sequence of events in this transaction, Mr. Ferrando, was that you received this letter from Mr. Cosgrove, Exhibit No. 1, that's dated February 8. Do you recall when you received that letter?

A. Gee, I don't. [21]

Q. Upon receipt of that letter did you go with your mother to Mr. Cosgrove's office and execute an estate tax return, sign your names to an estate tax return? A. Yes.

Q. Was that prior to the time you drew this check, Defendant's Exhibit A?

A. I don't remember.

Q. Well, did you draw this check, Exhibit A, after you had been to Mr. Cosgrove's office and

(Testimony of Fred Ferrando.)

signed the tax return? A. I don't remember.

The Court: Must have been on or about that time, is that right?

The Witness: Must have been, yes.

Q. (By Mr. Gillard): Where did you get the amount to insert in the check, Exhibit No. A?

A. Mr. Cosgrove gave me the amount over the telephone.

Q. When you signed the tax return, did you notice what the amount of the tax that was due?

A. Probably I did at the time, but I don't remember the amount.

Q. When your tax return was presented to you, for signature, did you look through it to determine the amount of the tax that was due?

A. I am not sure, I don't remember whether I did or not.

Mr. Gillard: If the Court please, I have here the original [22] estate tax return in the estate of Mario Ferrando and also a photostatic copy of the same. With the consent of counsel I will have marked for identification the photostatic copy.

The Court: Very well.

The Clerk: Defendant's Exhibit C marked for identification.

(Whereupon photostatic copy of estate tax return of estate of Mario Ferrando marked Defendant's Exhibit C for identification only.)

Q. (By Mr. Gillard): I will hand you Defendant's Exhibit C for identification and ask you if you can identify that document, Mr. Ferrando, di-

(Testimony of Fred Ferrando.)

recting your attention particularly to the next to the last page thereof, which is the signature page.

A. That's my signature.

Q. Would you prefer to see the original document for comparison purposes, Mr. Ferrando? It might help you.

A. That is my signature, too.

Q. Is Exhibit C, the photostatic copy, a copy of the original return which I am now showing you?

A. Yes.

Q. Is that the return you signed in Mr. Cosgrove's office after receiving Plaintiff's Exhibit No. 1, this letter?

A. I think so, yes.

Q. And who was present at the time you signed that return, Mr. Ferrando?

A. Mr. Cosgrove and my mother.

Q. Was Ruth Cosgrove, the notary, present?

A. No. [23]

Q. What is the date of the notarial acknowledgment on that return?

A. 15th day of July, 1948.

Q. Was that the day the return was signed?

A. I don't remember.

Q. Was that date on the return when you signed it, Mr. Ferrando?

A. I am not sure, I don't remember.

Q. You don't remember that? A. No.

Q. It could have been on there?

A. It could have been.

Q. That is the same date that is on your check, Defendant's Exhibit A, is that correct, July 15, 1948?

(Testimony of Fred Ferrando.)

The Court: Well, it shows that.

Q. (By Mr. Gillard): I will refer you to the third from the last page on the exhibit showing the net estate tax payable, \$14,525.69. At the time you signed the return did you notice that total amount of tax due? A. I don't remember, sir.

Q. Your best recollection is that the amount of the tax that was payable you secured from Mr. Cosgrove on the telephone after you had signed the return, is that correct? A. Yes.

Mr. Gillard: I will ask that Defendant's Exhibit C be [24] admitted into evidence.

The Court: Admitted.

The Clerk: Defendant's Exhibit C admitted into evidence.

(Whereupon Defendant's Exhibit C heretofore marked for identification only was received and marked in evidence.)

Q. (By Mr. Gillard): At the time you went to Mr. Cosgrove to employ him as an attorney, as the attorney in this estate, did you ask him with reference to his prior experiences in handling estates and Federal estate tax returns?

A. No, sir, I did not.

Q. Did you make any inquiry of anybody else as to Mr. Cosgrove's expert knowledge and ability to handle and file Federal estate tax returns?

A. No, sir, I didn't.

Q. Now, this check, Defendant's Exhibit A, was eventually returned to you from your bank?

A. Yes.

(Testimony of Fred Ferrando.)

Q. At the time that you received it back, Mr. Ferrando, did you notice that the date July 15, 1948, had been inserted on it? A. No.

Q. You did not notice that? A. No.

Q. When was the first time you became aware of the fact [25] that that date had been inserted on that check?

A. At the first trial, I believe, when it came up for exhibit.

Q. You are referring to the criminal trial involving Mr. Cosgrove? A. That is right.

Q. You never, I gather, then, at any time asked Mr. Cosgrove about the back-dating of your check?

A. No, I haven't, sir.

Q. If I understand you properly it is your testimony that you don't recall whether or not you left this date blank because you merely failed to put the date in, you deliberately left it out, or Mr. Cosgrove told you to leave it out, is that correct?

A. That's right.

Q. You have no recollection about it whatsoever? A. No, sir.

Q. Is it an ordinary practice of yours——

A. No, sir, it isn't.

Q. ——to omit the dates from checks?

A. No, sir.

Q. Don't you have any recollection at all, Mr. Ferrando, about that date?

A. Only thing I can remember, sir, is Mr. Cosgrove called me during the noon hour, asked me to make this check out, gave [26] me the amount, I

(Testimony of Fred Ferrando.)

made the check out, the date was left off, I don't remember him telling me to leave the date out.

Q. Did he tell you at that time that the return was late? A. No, sir.

Q. Now you have received, have you, Mr. Ferrando, from Mr. Cosgrove an indemnity in the event that you are unsuccessful in this action for a refund of these penalties?

Mr. Howard: I object to that question, your Honor. I don't think it is at all material or relevant to the issues involved in this proceeding. The question here is whether there is reasonable cause as respects these plaintiffs for the late filing of these returns.

The Court: Well, it might have some relevance in relation back as to the circumstances under which the return was made and the check made out. I will overrule the objection.

Q. (By Mr. Gillard): Do you have the question, Mr. Ferrando?

A. Do I understand you are asking whether I have a letter from Mr. Cosgrove saying that he would reimburse me for penalties that are paid out?

Q. That is correct. A. Yes.

Q. You have that with you?

A. I don't have it.

Q. Your attorney has it? A. Yes. [27]

Q. Do you recall when that was executed?

A. I do not remember, sir.

Q. Was it executed prior to the institution of this action? A. Oh, no.

(Testimony of Fred Ferrando.)

Q. Do you know when this action was filed, sir?

A. No.

Q. Let me put it this way to you: Was it executed——

A. I think——

Q. Was it executed prior to the time you filed a claim with reference to the refund of the taxes with the Internal Revenue Service?

A. Sir, I believe I received that letter the day that—paid the penalties.

Q. The day you paid the penalties?

A. Yes, I believe that is the day we received the letter, or a day after.

Q. Had you paid penalties on one or more than one occasion?

A. One occasion. I believe the amount is \$4800, somewheres near there.

Q. Didn't you pay a certain amount——

The Court: Isn't there a record as to when they were paid? I notice the complaint alleges penalties were paid on two occasions.

Mr. Gillard: That is correct, your Honor. They were within a very short time of each other. Will it be stipulated, [28] Counsel, these penalties the witness is now referring to, those alleged in the complaint, as having been paid on the 19th day of December, 1951—I beg your pardon, on the day I have here is February 19, 1951, is that the date?

Mr. Howard: So stipulated, your Honor.

The Court: They were paid on December 23, 1951 and January 4, 1952.

(Testimony of Fred Ferrando.)

Mr. Gillard: That is correct, your Honor, December 23, 1951 and January 4, 1952.

Q. (By Mr. Gillard): It was about that time, is that correct, that Mr. Cosgrove executed an indemnity agreement to repay to you the amount of those penalties in the event that you did not recover them back? A. That's right.

Q. In connection with that agreement did you agree to file an action for a refund of those penalties? A. Yes.

Q. And that claim for refund was actually filed by you, or signed by you on December 10, 1952, is that correct? A. Yes, sir.

Mr. Gillard: Will you mark this for identification?

The Clerk: Defendant's Exhibit D marked for identification.

(Whereupon claim received and marked Defendant's Exhibit D for identification only.)

Q. (By Mr. Gillard): I will show you Defendant's Exhibit D [29] for identification, Mr. Ferrando, which is a claim for refund, and ask you if that is your signature on the bottom of it?

A. Yes, it is.

Q. That was dated by you on December 10, 1952.

A. That is not my writing, my initial, that is my initial.

Q. The December 10 — there was an original date typewritten on the face of the claim of November 6, is that correct? A. Yes.

(Testimony of Fred Ferrando.)

Q. That was stricken out and December 10 written over it and you initialled the change?

A. That is right.

Q. And then your signature is on the right-hand side?

A. That's right.

Q. Along with your mother's.

A. That's right.

Mr. Gillard: Ask this be admitted in evidence as next in order.

The Court: Admitted.

The Clerk: Defendant's Exhibit D admitted into evidence.

(Whereupon Defendant's Exhibit D heretofore marked for identification only was received and marked in evidence.)

Q. (By Mr. Gillard): That claim then was filed by you and your mother pursuant to your agreement with Mr. Cosgrove that you attempt to recover from the United States the amount of [30] penalty that you had paid, and the agreement with him was, and is right now, that in the event you are unsuccessful in collecting this amount back from the United States Mr. Cosgrove will pay that amount to you?

A. That is right, sir.

Mr. Gillard: I have no further questions. One further question, Mr. Ferrando.

Q. (By Mr. Gillard): In this entire transaction of handling the estate of your father as between yourself and your mother, you were the one—you're quite a bit younger than your mother?

A. That's right.

(Testimony of Fred Ferrando.)

Q. And you were the one that was actually handling the business relations with Mr. Cosgrove?

A. That is right.

Q. Your mother merely did everything you told her to do? A. That is right.

Q. And she had little or no direct contact with Mr. Cosgrove? A. That is right, sir.

Q. Whatever there is that is known about the affairs of the estate and the matter of delivery of information to Mr. Cosgrove or seeking information from him, you were the moving spirit in that?

A. That is right.

Q. And you were the spokesman for the two of you? [31] A. That is right.

Mr. Gillard: Thank you.

Redirect Examination

Q. (By Mr. Howard): Mr. Ferrando, I have here the file in the Superior Court, City and County of San Francisco, Probate No. 109,505, which Mr. Gillard has shown you before. Now, this file contains a number of documents bearing the signature of yourself and Mrs. Ferrando, and I show a petition for probate of the will and issuance of letters testamentary. A. Yes.

Q. Is that your signature on there?

A. Yes.

Q. The signature of your mother?

A. That's right.

Q. And that was signed by you at the request of Mr. Cosgrove? A. That's right.

(Testimony of Fred Ferrando.)

Q. In his office? A. Yes.

Q. I have here the letters testamentary which were issued in that proceeding; is that your signature there? A. That's right.

Q. And that is the signature of your mother?

A. That's right.

Q. And you recall that that was signed at the courthouse in San Francisco? [32] A. Yes.

Q. Was Mr. Cosgrove present at that time?

A. Yes.

Q. Now, the inventory—here's a petition to establish the fact of death and determining joint tenancy, which was filed in this proceeding, and it is signed by Marguerite Ferrando; that is your mother? A. That is right.

Q. Were you present when she signed that?

A. I don't remember, but I must have been.

Q. Now, this document contains a number of legal descriptions of property. A. Yes.

Q. Do you know whether you furnished those to Mr. Cosgrove? A. No.

Q. Now, all the documents contained in this file were signed by you at the request of Mr. Cosgrove, is that correct? A. That's right.

Q. And in his office? A. Yes.

Q. Now, I have here the inventory and appraisal that Mr. Gillard referred to and which he showed to you a few minutes ago. That likewise contains a description of a number of parcels of real property of your father's estate?

A. Yes. [33]

(Testimony of Fred Ferrando.)

Q. Did you furnish Mr. Cosgrove those legal descriptions of deeds, do you recall?

A. I think we did give him the deeds, yes, sir.

Q. Now, the first time that you were asked to sign Federal estate tax returns was the time you received this letter in evidence as Plaintiff's Exhibit No. 1 for Mr. Cosgrove, is that correct?

A. I believe it is, yes.

Q. You responded promptly to this request, is that your best recollection? A. Yes.

Mr. Howard: I have no further questions of this witness.

Mr. Gillard: No further questions.

The Court: That's all.

(Witness excused.)

Mr. Howard: Mrs. Ferrando.

MARGUERITE FERRANDO

one of the plaintiffs here, called as a witness in her own behalf; sworn.

The Clerk: Please tell the Judge your name.

The Witness: Marguerite Ferrando.

Direct Examination

Q. (By Mr. Howard): Mrs. Ferrando, you are the Marguerite Ferrando who is named as a plaintiff in the proceedings now? A. Yes. [34]

Q. In this court, is that correct? You are the widow of Mario Ferrando, who died on April 22, 1947, in San Francisco? A. Yes.

Q. And you are named in his will as a co-executor of that will, is that correct? A. Yes.

(Testimony of Marguerite Ferrando.)

Q. Where were you born, Mrs. Ferrando?

A. Montevideo, South America.

Q. When did you come to this country?

A. Oh, about 1900, I guess; 1900.

The Court: What was your name, maiden name?

The Witness: Carrero.

The Court: You are not of Italian descent?

The Witness: Oh, yes, Italian.

The Court: Your parents were Italian; they lived in Uruguay?

The Witness: They lived very little in South America.

The Court: Only a short time?

The Witness: A short time.

Q. (By Mr. Howard): How old were you when you came to San Francisco?

A. I was about ten or eleven, something like that.

Q. Did you go to school in this city?

A. San Francisco.

Q. Did you go to grammar school here? [35]

A. Yes.

Q. You recall where?

A. Southland School, out in the Portola District.

Q. Did you have any education beyond that point? A. No.

Q. When did you marry Mario?

A. In 1909.

Q. Where did you live at that time?

A. Used to be Charter Oak at that time, Charter Oak Avenue; now it's Bayshore.

(Testimony of Marguerite Ferrando.)

Q. That's in the Portola District?

A. Portola District.

Q. You lived there until the time your husband died?

A. Oh, yes.

Q. At the time of your husband's death, did you know Lloyd J. Cosgrove?

A. Yes.

Q. Did you know of his reputation in the community?

A. Yes.

Q. What was your understanding of his reputation at that time?

A. That he was good; he was all right.

Q. Now, you went to Mr. Cosgrove with your son?

A. Yes.

Q. Fred, at the time of your husband's death?

A. Yes.

Q. You employed him to probate the will and to administer the estate, is that correct?

A. That's right.

Q. Now, did you actively participate with your son in the problems relating to the probate of the estate, Mrs. Ferrando?

A. Yes, always with my son.

The Court: Why don't you reword that a little more simply? That is pretty much of a lawyer's question.

Q. (By Mr. Howard): Mrs. Ferrando, in dealing with Mr. Cosgrove in matters relating to the estate, was it your son who carried on most of that?

A. Yes, it was my son.

Q. And you just appeared at times when Mr. Cosgrove requested it, is that it?

(Testimony of Marguerite Ferrando.)

A. That's right.

Q. You signed documents he presented to you for signature? A. Yes.

Q. Now, do you recall, Mrs. Ferrando, signing a Federal estate tax return in Mr. Cosgrove's office?

A. Yes, I signed something, I don't remember.

Q. You don't remember specifically the nature of the document? A. No.

Mr. Howard: I have no further questions. [37]

Cross Examination

Q. (By Mr. Gillard): Mrs. Ferrando, you went to Mr. Cosgrove's office whenever your son told you you should go down there? A. Yes.

Q. And you relied upon him for the conduct of your duties as executrix of the estate, did you not?

A. Yes.

Q. And anything he asked you to do you did?

A. Yes.

Q. Anything Mr. Cosgrove told you to do you did? A. Yes.

Q. You didn't ask any questions of anybody?

A. No.

Q. You just signed the papers?

A. Yes, that is right, what he told me.

Mr. Gillard: Thank you.

The Court: That is all?

Mr. Howard: That is all.

(Witness excused.)

Mr. Howard: Your Honor, that completes the testimony of the Ferrando case, except for such

testimony as Mr. Cosgrove will give in that proceeding.

The Court: Do you want to put him on once, is that it?

Mr. Howard: Put him on once after the Ferrari testimony [38] is in so that he could cover both situations at one time.

The Court: Is that agreeable to you?

Mr. Gillard: There is apt to be a little confusion. If the Court wants to try it——

The Court: I won't have any trouble following it, I'm just wondering whether making the record in that way would be satisfactory to both you people. There is a common ground of testimony, of course, because the facts are the same and the law——

Mr. Gillard: The only possibility of confusion on the record would be in the event there is an appeal, you would have to break up his testimony and designate it, but that would be no onerous burden.

The Court: Well, it may be for the sake of accuracy you might conclude—you could take the lawyer's testimony with respect to the Ferrando case, and then after you do that make him the first witness with regard to the other case. Is that what you had in mind, to save the reappearance?

Mr. Howard. Yes.

The Court: Would that be all right?

Mr. Gillard: Yes.

The Court: Do you have any testimony yourself in the Ferrando case?

Mr. Gillard: No, I don't believe so, your Honor.

The Court: I just asked that so we can keep the record [39] straight. Go ahead, then.

Mr. Howard: Shall we proceed at this time?

The Court: Yes.

Mr. Howard: Mr. Cosgrove.

LLOYD J. COSGROVE

called as a witness by the plaintiffs, sworn.

The Clerk: Please state your name to the Court, sir.

The Witness: Lloyd J. Cosgrove, 2811 Mission Street, San Francisco.

Direct Examination

Q. (By Mr. Howard): Mr. Cosgrove, what is your profession? A. Attorney-at-law.

Q. How long have you practiced your profession?

A. Close to thirty years in San Francisco.

Q. Where is your office located?

A. 2811 Mission Street, San Francisco.

Q. You recall when you were admitted to practice? A. March of 1926.

Q. Now, in the course of your professional practice did you handle the probate of estates?

A. I have.

Q. In the course of probating estates were you familiar with the requirements of the law relating to inheritance and estate taxes?

A. I believe I was. [40]

Q. Now, did you know Mario Ferrando?

A. I did.

(Testimony of Lloyd J. Cosgrove.)

Q. Did you prepare his last will and testament?

A. I believe I did.

Q. And after his death were you employed by the co-executors of that will, Fred Ferrando and Marguerite——

A. I was.

Q. In probating the estate? Do you recall when you were employed?

A. No, but I understand the file is here, and if I were to look at the file I could get the approximate date.

Q. Was it shortly after the death of Mario Ferrando?

A. I would say it was shortly after the death of Mr. Ferrando.

Q. Did Mr. Ferrando and his mother appear in your office?

A. I believe they did.

Q. At that time did you outline to them the responsibilities you would assume in the probate of the estate?

A. No, I don't think I did outline, I have no independent recollection as to what did take place, but the normal procedure and the procedure that I followed at that time and still follow, is that the person comes in and wants me to handle the estate, I tell them I would take care of it and finish the job for them. I wouldn't outline to them procedures or steps that are required.

Q. Did you have any discussion with them about taxes at that [41] time that were involved in this estate?

A. I have no recollection on it.

(Testimony of Lloyd J. Cosgrove.)

Q. You undertook, then, to probate the estate in all its aspects, is that it?

A. I assumed the obligation of probating and finishing the administration of that estate.

Q. Including the responsibility for the preparation of the inheritance tax returns?

A. I did.

Q. Inventory and appraisements?

A. The complete administration of that estate I assumed when I assumed the responsibility of filing the petition for probate of the will and I contemplated and figured on carrying it to a completion and do everything that was necessary to be done in the administration of that estate.

Q. Now, in the course of probating of the estate you had occasion from time to time to contact Fred Ferrando?

A. I did.

Q. And for what purpose?

A. Well, the first thing, contacted him for the filing of the petition for probate of will. Next we contacted them for appointment to go into court. Next we contacted him for the gathering and marshalling of the assets, and at various times contacted them, as steps were taken on the administration of the estate I would contact them and present what was necessary. [42]

Q. Now, did Mr. Ferrando respond to the various requests for assistance?

A. I would say he did.

Q. In other words, you received cooperation from him in this connection?

(Testimony of Lloyd J. Cosgrove.)

A. Full cooperation.

Q. Now, with respect to the Federal estate tax return, which is in evidence in this proceeding, did you have any conversations relating specifically to the Federal estate tax return with Mr. Ferrando prior to the time you addressed a letter to him under date of February 8, 1949, advising him that the return had been prepared?

A. I have no recollection of any conversations with him prior to that date.

Q. Now, in response to your letter, which is in evidence as Plaintiff's Exhibit No. 1, Mr. and Mrs. Ferrando came to your office, is that correct?

A. That is right.

Q. And while there you presented to them a Federal estate tax return?

A. I believe that is correct.

Q. And they signed that return in your presence?

A. I believe so.

Q. Was there anyone else present at the time?

A. Not that I can recall. [43]

Q. At that time, at the time of that conversation, or any prior conversations or any subsequent conversations between you and Mr. Ferrando, was there any discussion relating to the fact that that return was then delinquent?

A. None prior to, none at that time, but subsequently and quite a while afterwards when we were in court here, yes, but not prior to that time.

Q. Now, did you at any time advise Mr. Fer-

(Testimony of Lloyd J. Cosgrove.)

rando prior to the time that you were in court here that the return was in fact delinquent?

A. No, and I never considered it delinquent.

Q. You say you never considered it delinquent?

A. That's correct.

Q. And why was that, will you explain that?

Mr. Gillard: Object to that as incompetent, irrelevant and immaterial.

The Court: That would call for his opinion and conclusion. You can have testimony as to any facts, what was said and done, but the answer you call for there would be argumentative.

Q. (By Mr. Howard): Was it your understanding at the time Mr. and Mrs. Ferrando were in your office that the return was then delinquent in the sense that the due date as might have been extended was then past?

Mr. Gillard: Object to that as incompetent, irrelevant and immaterial and contrary to the theory of the action and [44] claim for refund filed in this action, that this is a delinquent return that has been filed. What his understanding of the law is is completely beside the point.

The Court: I think that is true. What are you now trying to get at, Mr. Howard?

Mr. Howard: Well, the legal question presented here is whether these penalties were due.

The Court: That is the legal question. Are you asking him whether he knew that the time within which the return fixed by regulation and statute

(Testimony of Lloyd J. Cosgrove.)

for its filing had gone by? I take it that he must have known that.

Mr. Howard: Let's put it this way, your Honor, please:

Q. Did you know, then, Mr. Cosgrove, at the time this return was signed by Mr. and Mrs. Ferrando that the time for filing the return as fixed by the law and the regulations had passed?

A. Rather difficult for me to answer that question, Your Honor.

The Court: I take it you must have known because of the fact the return was predated.

The Witness: I could answer that in this manner: I knew that the Revenue Act provided that the return should be filed within fifteen months period and it was after that period of time.

Q. Did you have any extension of time to file?

A. I did. [45]

Q. To file a return after that date?

A. I did.

Q. You did? A. Yes.

Q. From whom did you obtain that extension of time?

A. Mr. Paul Doyle, Internal Revenue.

Mr. Gillard: If your Honor please, I will move to strike the last two questions and answers on the ground that the theory behind those questions must stand behind the claim in this case. The claim, which is Exhibit D is:

“Claimants therefore contend that the failure of the estate to make and file the Federal estate tax

(Testimony of Lloyd J. Cosgrove.)

returns required by Section 821 of the Internal Revenue Code within the time prescribed by law (on or before July 20, 1948) was, as respects themselves, and all persons interested in the estate as beneficiaries, legatees and devisees thereof, due to reasonable cause and not to willful neglect."

And the complaint is couched in the theory that the return was filed delinquent.

The Court: You didn't file the claim for refund on the basis that the return was in fact not delinquent?

Mr. Howard: No, we filed the claim for refund on the basis that the return was in fact delinquent and we are not contending here for the purpose of this examination that the [46] return was timely filed.

Now, the theory of the Government's attack on this case, as I understand it, is that the failure to file was not due to reasonable cause and that the neglect, if there was neglect, on the part of the attorney should be borne the responsibility—the responsibility should be borne by the plaintiffs in this case and that there was not good faith.

The Court: Well, of course, what you are really—I am not attempting to discuss the legal aspect of it now, but what you are really saying and have in mind there is that if this were a case in which, between the executor and the attorney, the attorney might for neglect and failure to perform his legal duty with respect to the administration of the estate, the attorney might assert a defense that in

(Testimony of Lloyd J. Cosgrove.)

fact he relied on some other facts and circumstances, or other persons, and that in fact he had a justifiable excuse for his delay in the matter. I am not certain, however, how that would apply on the claim for refund of the estate. I don't know whether I make myself clear on that. That is another aspect. What might be admissible in evidence, for example, by way of defense in a suit against the attorney for improper performance and duties, might not be material in the suit for refund of taxes, of a penalty on the ground that there was justifiable excuse.

Mr. Gillard: I renew my motion to strike the last two questions and answers, if the Court please.

The Court: I don't know whether they have been answered.

Mr. Gillard: The last two questions and answers.

The Court: Were there answers?

Mr. Gillard: There were answers. He said he had an extension from Mr. Paul Doyle.

The Court: Until that is clarified by some further foundation or other questions I will grant the motion. You can cover it again, if you wish to.

Q. (By Mr. Howard): Mr. Cosgrove, during the course of the administration of this estate and prior to the filing of the Federal estate tax return, did you have any conversations with Mr. Paul Doyle, the then Deputy Collector, or Chief Deputy Collector of the Internal Revenue?

A. I did.

Q. What was the nature of those conversations?

(Testimony of Lloyd J. Cosgrove.)

Mr. Gillard: Object to that as incompetent, irrelevant and immaterial, and hearsay.

Q. (By Mr. Howard): But you did have——

The Court: I will allow the witness to answer the question so that we can have a record, and then I'll rule on a motion to strike. I could better determine the real competency on some fact statement, real competency of the testimony on some fact statement. He may answer subject to a motion to strike.

A. Prior to the date that the Federal estate tax return was [48] to be filed, as provided by the regulations, I called Mr. Paul Doyle and told him that I had such an estate and a return would be due on such a date, and that through the pressure of business in the office we weren't able to get it out. I was then told to bring in the return when I did have time to prepare it and file it. I consider that an indefinite extension of time, an oral extension of time to file it.

I knew the regulations provided the fifteen month period. I knew that you can go there and make an affidavit and get your extension of time. But in my practice I communicate with the attorneys over the telephone every day of the week and get extensions of time, and I take their word and they take my word, and that's all. We handle that as we would handle any other pleading in a civil case involving the civil courts of San Francisco, to secure an extension of time in which to file.

Q. Now, Mr. Cosgrove——

(Testimony of Lloyd J. Cosgrove.)

Mr. Gillard: Now, on the basis of that, your Honor please, I move to strike on the ground that the intendment of this type of testimony is to show that the return was timely filed. The witness is asserting that this was in the normal course of his business, a normal extension which he could rely on. I assert that that is not the foundation of this action and it can not possibly be the foundation of this action as filed, and therefore this testimony is incompetent, irrelevant and [49] immaterial, and move to strike the same.

The Court: This answer may involve the precise point on which you rely in this case.

Mr. Howard: If your Honor please——

The Court: And perhaps should stand for the time being. I don't know yet, until I get all of the evidence, whether it has any relevancy to the question of reasonable excuse for delinquency. It might, I don't know yet. I think the Court oughtn't to pass judgment on that. I will reserve ruling on your motion to strike and raise the question later. That goes to the essence of the case; if you don't succeed on that you are going to lose your case, aren't you?

Mr. Howard: My view of the case is if under the circumstances these executors employed and by training and background unable to discharge these responsibilities themselves, if they turned to a lawyer of fine reputation and long experience and entrusted that responsibility to him, and he in turn undertook to exercise that responsibility and did so in good faith, that under the laws, as I understand

(Testimony of Lloyd J. Cosgrove.)

it, reasonable cause is shown. The substance of the decision——

The Court: I really prefer that you don't argue this matter until we get the facts completed, because I don't want to make a snap judgment. At the moment it seems to me that this is a somewhat vital matter.

Mr. Gillard: If the Court please, I would like to direct [50] your attention to this, and I think, perhaps, the plaintiff has stated his position, I would like to point out to the Court, or to suggest it to the Court that the real issue in this case is the negligence or otherwise of the executor and executrix, and the question as to whether the attorney was competent or was negligent, or had reasonable cause to rely upon certain extraneous facts, and did things properly or improperly is not the question before the Court, and that no showing of completely proper action at all stages of the proceeding on the part of Mr. Cosgrove, if that were the situation, would have any bearing upon the question whether or not the executor, who is suing for the refund, who paid the penalty, and the only party in interest, would have no bearing upon the question of whether or not the executor was negligent or willfully negligent in the matter.

The Court: I'm not certain about that. The executor, of course, can act through an agent or a representative; it may be that the act of the agent or representative is the act of the executor. All that I think that we ought to do at the moment is to re-

(Testimony of Lloyd J. Cosgrove.)

serve the ruling so that we have the evidence in, if it not competent and material to the issues, it is there, and it can be stricken out, but it's there for the record so that either side may have it for what worth it has, either in affirmance of the claim or——

Mr. Gillard: (Interrupting) I suggest to the Court, if [51] we are going to try, in effect, if we are going to try Mr. Cosgrove, which is the direction the Court is now taking, I am going, perforce, I believe, have to ask for an extension of time, and the case is going to assume all the aspects of a criminal trial. Then the Court is going to be trying Mr. Cosgrove on the question of whether or not he acted properly in this case, not the Ferrandos, and that the witnesses will have to be numerous.

The Court: You may be right about that. The Ferrandos may be bound by the failure of the attorney not to file within the time specified.

Mr. Gillard: Has the Court read the claim? The theory of the claim and, of course, the complaint and cause of action is no different and can't go beyond that is: That these returns were not timely filed as required by law, but that the executors were not—that this late filing was not due to, as far as the executors are concerned it was due to reasonable cause and not to willful neglect, as far as the executors are concerned. That is the basis of the claim.

The Court: I understand your contention. Your contention is in order for the executors to support their claim for a refund they must show they have

(Testimony of Lloyd J. Cosgrove.)

reasonable grounds for the delay.

Mr. Gillard: That is correct.

The Court: Untimeliness of the claim. I think that, of [52] course, is the issue, but I didn't intend we were going to get into the phase of the matter that you suggested.

Mr. Gillard: I think it is unavoidable.

The Court: I don't think it is material.

Mr. Gillard: It is unavoidable.

The Court: But the answer of the witness does give the basis upon which the witness acted, and you are not intending to pursue that any further, are you?

Mr. Howard: No, I am not.

The Court: I will reserve ruling on the motion to strike this.

Mr. Howard: I just wanted to ask one additional question which I think is material, and is this: May I ask the question, proceed to ask it?

Q. (By Mr. Howard): Mr. Cosgrove, did Mr. Ferrando and his mother, Mrs. Ferrando, have any knowledge of your conversations or your relationship with the Collector of Internal Revenue with regard to the filing of this return?

Mr. Gillard: I will object to that as calling for an opinion and conclusion of the witness.

The Court: Yes, you can ask whether he ever told him, to avoid that part of it.

The Witness: I never told him.

Q. (By Mr. Howard): Did you ever communicate to Mr. Ferrando or his mother any of your

(Testimony of Lloyd J. Cosgrove.)

conversations with the office of the [53] Collector of Internal Revenue with regard to the filing of the return? A. I did not.

Q. Did you ever advise Mr. Ferrando or his mother that the law required the filing of the return within fifteen months?

A. I don't believe so.

Q. Did you ever advise Mr. Ferrando or his mother that you had obtained an extension of time to file the return? A. I don't believe so.

Mr. Howard: I have no further questions.

The Court: Would you prefer this matter be continued after the noon recess?

Mr. Gillard: It is getting a little long.

The Court: We will recess and resume at 2 o'clock, then.

(Whereupon at 12 Noon a recess was taken.)

Thursday, March 15, 1956—2:00 p.m.

Mr. Gillard: Had you finished your examination?

Mr. Howard: I just wanted to ask the witness one question.

Q. (By Mr. Howard): Mr. Cosgrove, how long had you known Mr. Ferrando, prior to the time of his father's death?

A. Oh, I'd say for a period of, say, fifteen to twenty years.

Q. Had you had any professional relations with him during that time?

A. With him and his family, yes.

(Testimony of Lloyd J. Cosgrove.)

Q. You represented them in various legal matters?

A. I would say for a period of fifteen to twenty years I represented Fred Ferrando of Ferrando and Company, yes.

Mr. Howard: I have no further questions.

Cross Examination

Q. (By Mr. Gillard): Mr. Cosgrove, you were in the courtroom this morning, were you, when Mr. Ferrando, Mr. Fred Ferrando was testifying?

A. Yes, that is right, sir. I might say I wasn't here when he commenced to testify, but I arrived around, oh, a quarter to eleven, eleven o'clock, sir.

Q. Were you here during that period of time when he was testifying with reference to an indemnity agreement with you with reference to this? [55]

A. I heard him testify on that subject.

Q. Is that correct, sir, that you had agreed to indemnify him in the event that he is not successful in this action?

Mr. Howard: We make the same objection to that question, your Honor, that I did in the case of Mr. Ferrando.

Mr. Gillard: This goes directly to bias and interest.

The Court: Overruled.

A. I would like to answer that without a yes or no at this time, if you don't mind.

When I was in difficulty and Mr. Ferrando was

(Testimony of Lloyd J. Cosgrove.)

called upon for a penalty in this tax, I told him that he would not suffer a loss as far as I am concerned. Subsequently I gave him a letter—Mr. Alioto, who represented me, gave him a letter to the extent that we would reimburse—that I would reimburse him in the event he suffered a loss as far as that penalty was concerned. It was not conditional or contingent upon him filing the suit, or it wasn't subject to him obtaining any money back from the penalties he paid.

I felt that I undertook to do a job; if by virtue of my conduct there was penalty imposed upon him, I told him I would—he would not suffer a loss, and I confirmed that in a letter.

Q. And you confirmed the letter from Mr. Alioto to Mr. Ferrando?

A. That is correct. [56]

Q. So as the matter now stands, Mr. Cosgrove, what is the extent of your guaranty to Mr. Ferrando and Mrs. Ferrando?

A. I think that is something I don't think the Court will have to interpret, because I don't think it will ever go that far. But I recognize a moral obligation there; whether or not it is legal it is immaterial to me, it is an obligation on my part. If he suffers any loss I am willing to see he is reimbursed by me.

Q. You are aware of the fact that as the matter now stands Mr. Ferrando has paid in penalty and interest on that penalty the sum of \$4,706, are you not?

A. I realize that, sir; yes.

(Testimony of Lloyd J. Cosgrove.)

Q. That is the extent of his loss as of this minute, is that correct, plus interest on that amount since it was paid in early '52.

A. I recognize that he paid certain monies, sir, and my statement to him has been, and I think covered by that letter, that I indemnify. No mention has been made about interest at all, sir, and I don't recognize any interest; but I recognize that, the money he paid out.

Q. The loss, if he suffers a loss, it will only be as a result of not being successful in this action, is that not true, Mr. Cosgrove?

A. I would say so.

Q. So that you have a financial interest in this litigation [57] to the extent of \$4,700, is that correct?

A. That is a matter of opinion; I don't know how to answer that.

Q. You wouldn't reach that conclusion?

A. No, I wouldn't reach that conclusion, sir.

Q. What conclusion would you reach, sir?

A. I recognize a moral obligation to him, sir, if he suffers any loss at all I am willing to stand behind my statement to reimburse him. Whether I have a financial interest in this case is something his Honor might determine, but I can't determine that.

Q. Mr. Cosgrove, prior to the time that the Ferrandos came to you in this matter, did you consider yourself to be an expert in or specializing in Federal estate tax returns?

(Testimony of Lloyd J. Cosgrove.)

A. No, I didn't, never considered myself a specialist. I considered myself just the average attorney. I had a neighborhood practice, still have a neighborhood practice. I do considerable amount of probate work. I don't say that in a bragging manner, sir, but I do say this: That we have kept rather busy in the practice of the law, but I consider myself only an average attorney.

Q. There is in the profession a certain group of attorneys who do specialize in tax matters, is that correct?

A. Are you referring to Federal estate taxes?

Q. No, Federal taxes. [58]

A. Well, I guess there are groups of men who specialize in various fields; I do know some that specialize in income tax work, some who specialize in personal injury work, some who specialize in collection work, if that is what you mean.

Q. Well, at that time——

A. I know of no one who specializes in Federal estate as a specialist.

Q. Did you consider yourself to be expert in the field of Federal estate tax returns?

The Court: He has already answered that, Mr. Gillard.

Mr. Gillard: Did he?

The Court: He said no.

Q. (By Mr. Gillard): Did you represent to the Ferrandos that you were a specialist in Federal estate tax returns?

A. No, sir, I couldn't represent that to anybody.

(Testimony of Lloyd J. Cosgrove.)

Q. Did they ask you if you were a specialist in handling those matters?

A. I don't think so, no. I wouldn't know, but my answer would be no.

Q. As a matter of fact, during this period of time and prior to the time the Ferrandos came to you, and subsequent to that time for complicated estate taxes that came into your office you referred those out to other people for the preparation of the returns, did you not, Mr. Cosgrove?

A. That is correct, sir; and "other people" would be a [59] certified public accountant.

Q. Now, sir, you testified towards the close of your direct examination with respect to a verbal agreement you had with Mr. Doyle with reference to an extension of time to file this return, you referred to that as in the nature of a stipulation with another attorney?

A. That is right, sir.

Q. In any other of the Federal estate tax returns that you had to file, did you have such agreements with Mr. Doyle?

A. I don't know; anyone in particular you have in mind, sir?

Q. No, I am asking you if you recall you did that on other occasions with Mr. Doyle?

A. Right now I can't recall it.

Q. Were there any situations you can recall you did not do that with Mr. Doyle?

A. Oh, many estate returns have been filed.

Q. But you did not do that?

A. Well, I did not request it of anybody.

(Testimony of Lloyd J. Cosgrove.)

Q. Were there any situations in which you got an extension of time in any other manner than by this verbal agreement with Mr. Doyle?

A. Yes, I did.

Q. And what estate was that?

A. Estate of Ferrari, sir.

Q. In the estate of Ferrari you secured a written extension [60] of time from the office of the Collector of Internal Revenue, did you not?

A. That is correct.

Q. That was for a period of thirty days?

A. That's right.

Q. That was pursuant to the regulations that you referred to this morning, is that correct?

A. I wasn't referring to this matter this morning.

Q. Well, this morning when you testified you were asked if you were familiar with the time when returns were required to be filed and extensions thereof, and you said that you were familiar with what the regulations provided, is that correct?

A. I don't recall the question being directed to me in that language. I do recall the statement—question being asked of me, and I stated I knew the regulations asked that the returns be filed within a fifteen month period. I don't know if there was an extension included in that or not.

The Court: I think what Mr. Gillard refers to is some part of your answer in which you said that instead of filing affidavits and other documents nec-

(Testimony of Lloyd J. Cosgrove.)

essary for the extension you had a verbal understanding.

The Witness: That's right.

The Court: In the Ferrando case with the man in the Collector's office.

The Witness: That's right, sir. [61]

The Court: I think that is what you are referring to.

Mr. Gillard: Yes.

Q. (By Mr. Gillard): Mr. Cosgrove, at that time—now referring to 1947, '48, '49—were you familiar with the regulations with reference to the filing of estate tax returns and securing extensions on the filing date provided?

A. I would say as an average attorney I was.

Q. And what is your recollection as to what that knowledge was at that time?

A. My recollection is that that return should be filed within the fifteen months after date of death, or fifteen months after the appointment of an executor or administrator, if one is appointed within the sixty day period of time. I know there is some provision along that line.

I further know this: That extensions can be granted. I further know it was the common practice prevailing at that time.

Q. I am asking you about the regulations now, sir.

A. And the regulations provided an extension could be granted.

Q. For what period of time?

(Testimony of Lloyd J. Cosgrove.)

A. I am not familiar with that.

Q. Not familiar with the period of time for which an extension could be granted?

A. Right now I can't recall it.

Q. Would your action in the Ferrari estate indicate to you what [62] the period of time was?

A. No. I think I only asked for thirty days extension, and that is what I received.

Q. Wasn't that the period of time allowed for by the regulations, Mr. Cosgrove?

A. I don't think so, I think you could get additional time by filing an affidavit.

Q. Now, then, was it your understanding that from the Collector, that is the local Collector in the office of the Internal Revenue, you could secure a thirty day extension of time, is that correct?

A. I didn't know it was confined to the Collector, all I know is this: That what we had to do was to make application, and we received back in the mail the thirty day extension of time, and I received that in the Ferrari case; I asked for it and I got it. Now, what their powers were at that time I didn't know, any further than I was under the impression or belief you could get a further extension of time.

Q. In connection with these two estates, Ferrando and Ferrari, you knew from the time of the due date of the return that extensions would be required, did you not?

A. May I have that question again, please?

(Testimony of Lloyd J. Cosgrove.)

The Court: You mean it would be necessary for him to have an extension?

Mr. Gillard: Yes. [63]

A. Yes.

Q. (By Mr. Gillard): Upon the due date—let's take the Ferrando return, we are talking about that in this case first, upon the due date of that return, and by the way, was that return due on July 20, 1948? A. I couldn't recall.

Q. Do you recall the date of death of Mr. Ferrando, Mr. Cosgrove?

A. No, I do not recall. That's—it's right there in the files there, though.

Q. Well, if I were to tell you that the testimony has shown so far that the date of death in that case was April 20, 1947, and that the executors were not appointed within the sixty day provision you referred to, would you say that the return was due fifteen months after April 20, 1947?

A. I would say so.

Q. When was it that you went to see or you telephoned Mr. Doyle with reference to this verbal extension you testified about?

A. I would say within a very short time of fifteen months after the date of death.

Q. Your recollection is that it was after the extension period had expired? A. No, sir.

Q. It was prior to the time the fifteen months had expired? [64]

A. It was prior to the expiration of the fifteen month period of time, sir.

(Testimony of Lloyd J. Cosgrove.)

Q. For the purpose of determining in what fashion you should proceed to secure that extension, did you consult the regulations of the Treasury Department?

A. No, sir, I relied on the telephone, sir.

Q. You relied on the telephone. You did not acquaint yourself with either the statutes or the regulations in connection with that subject, is that correct?

A. I was familiar with what the regulations stated.

Q. Now, that is what I asked a little while ago, Mr. Cosgrove, what did those regulations state about that?

A. That the return should be filed within fifteen months after date of death.

Q. I am asking you about the extensions now, sir.

A. We are a little confused here now. The regulations—I was familiar with the regulations to the extent that I knew that the return should be filed within the fifteen month period of time, sir. Now, will you direct the next question?

Q. My next question to you, sir, then is: At the time that you went to Mr. Doyle, just shortly before the expiration of that fifteen months, did you, for the purpose of securing an extension, acquaint yourself with what the regulations said about how to secure an extension and for what time you could secure an extension? [65]

A. I made no independent investigation, sir,

(Testimony of Lloyd J. Cosgrove.)

other than to communicate with Mr. Doyle, who was number two man in the Internal Revenue Department in San Francisco. I explained to him my situation, I told him I didn't think—I couldn't get the return out on time, and I asked for more time and he granted me more time, which I thought he had the authority to do.

Q. Did you ask anybody what the regulations provided with reference to an extension?

A. I asked nobody other than that one gentleman.

Q. Isn't it a fact, Mr. Cosgrove, that at that time, as you indicated a little earlier in your testimony, that you knew that the extension that could be granted by the local office was thirty days?

A. I wouldn't say that, sir.

Q. Did you have any indication at all that there was any limitation of time imposed by the regulations on the power of the local collector to grant an extension of time to file an estate tax return?

A. At that time I don't believe I did.

Q. You mentioned the fact that there was also the possibility of securing an additional length of time by filing affidavits, is that correct?

A. That was my understanding.

Q. What was your understanding about that additional length of time, and the filing of affidavits? [66]

A. I don't want to be construed as using the word "additional." I knew the method of getting extensions of time, as far as filing the Federal es-

(Testimony of Lloyd J. Cosgrove.)

tate tax return, was to file an affidavit explaining the reason why you can't get it in on time and you can get an additional time.

Q. Did you do that, sir, in the Ferrando case?

A. No, sir, I did not.

Q. Did you do it in the Ferrari case?

A. No, sir, I did not.

Q. When did you seek the extension of time in the Ferrari case?

A. Within a few days prior to the expiration of fifteen months after the date of death.

Q. And how did you make application for that extension?

A. I really don't recall, not right now, I don't know whether I went down and asked, used a telephone and one was mailed to me, I really don't recall now.

Q. Did you file a written application for an extension?

A. I have no recollection on how that was obtained, sir.

Q. Do you know who you went to to get that extension?

A. Gee, right now I wouldn't know; I don't know.

Q. Did you go to Mr. Doyle?

A. I couldn't tell you, I don't know. There was one time I went to Mr. Smythe, he wasn't in, and I was directed to Mr. Doyle. One other time, I think in one case, I just telephoned down there, [67] or

(Testimony of Lloyd J. Cosgrove.)

went down there in the Estate Tax Division and got an extension, but I am not clear on that one.

Q. An extension was granted to you in that case, wasn't it, Mr. Cosgrove, in writing?

A. I received one in writing a day or two after I asked for it, I think.

Q. Within a day or two after you asked for it?

A. Yes.

Mr. Gillard: I am going to ask to have marked for identification in this case the second sheet in the photostatic copy of the return in the estate of Luigi Ferrari, that second sheet being a letter with reference to an extension of time secured in that estate.

The Clerk: That will be Defendant's Exhibit A in the Ferrari case.

Mr. Gillard: No, in this case.

The Clerk: Then that will be Defendant's Exhibit E marked for identification in the Ferrando case.

(Whereupon second sheet of letter received and marked Defendant's Exhibit E for identification only.)

Q. (By Mr. Gillard): I show you, Mr. Cosgrove, Exhibit E, and ask you if that is the document you referred to as having received in response to your request for an extension in the Ferrari case?

A. Yes, sir, that is the letter I received. [68]

Q. Thank you, sir.

(Testimony of Lloyd J. Cosgrove.)

Mr. Gillard: I will offer Exhibit E for identification into evidence.

The Court: Admitted.

(Whereupon Defendant's Exhibit E heretofore marked for identification only was received and marked in evidence.)

Q. (By Mr. Gillard): Now, Mr. Cosgrove,——

The Court: What does that say? Mind telling me about it now?

Mr. Gillard: Shall I read it to you, read it into the record?

The Court: I will read it. Go right ahead.

Q. (By Mr. Gillard): Mr. Cosgrove, was it your understanding in July of 1947 that under the regulations an indefinite extension of time could be secured to file an estate tax return?

A. Referring now to July of what year, sir?

Q. 1947.

A. I don't think I had any opinion on it at that time, sir. I say I don't think I had any opinion on it.

Q. Did you attempt to advise yourself at any time after securing this agreement you referred to with Mr. Doyle, as to the length of time that extension would run?

A. After I received this extension, as I believed it, from Mr. Doyle, I understood Mr. Doyle to be a man of executive [69] ability in an executive position with the Internal Revenue Department and in a position to give me what I asked for, and when he told me to bring it in when I got around to it, or

(Testimony of Lloyd J. Cosgrove.)

when I got it prepared, I understood, I believed him to have the authority to do it, and I further believed at that time that it was the common practice.

Q. You understood that to be an open extension allowing you to file that return at any time that you got around to doing it?

A. That is about right, sir.

Q. That would be regardless of whether it took you five years or ten years?

A. Well, we are dealing with reasonable limitations here, now.

Q. There was a limitation on it, Mr. Cosgrove?

A. I say reasonable limitation.

Q. There was a reasonable limitation on it?

A. No, but I say, construed, not going to have an unlimited extension of time, that will bring you beyond the reasonable length of time anyway.

Q. If it wasn't unlimited, Mr. Cosgrove, what was the limit?

A. There was no limit stated on it.

Q. There was no limit at all?

A. But you are not going to take advantage of an extension of time and not do it within a reasonable length of time.

Q. I gather from your testimony that you considered that Mr. Doyle, unlike any other employee in the Internal Revenue Service, [70] was not bound by the regulations of the Treasury Department applying to that service?

A. I didn't say that, sir.

The Court: Well, that's rather argumentative.

(Testimony of Lloyd J. Cosgrove.)

Q. (By Mr. Gillard): Now, sir, to whom did you refer the Ferrari matters for the preparation of an estate tax return?

A. I asked the office of Prior & McClellan to prepare the Federal estate returns in this matter after I forwarded all the information I thought he may need for the preparation of it.

Q. Prior & McClellan are certified public accountants?

A. Yes. In the Ferrari matter I prepared the first one.

Q. No, I am just talking about the Ferrando case now.

A. Ferrando.

Q. You know when you referred this matter to Prior & McClellan?

A. No, I couldn't say that, but in the record I think there are a lot of letters here as to the day it was forwarded to them.

Q. Let's see, this agreement you had with Mr. Doyle was some time in July of 1947, is that correct?

A. What was the date of death, if you have that information?

Q. The date of death was April 20, 1947—I beg your pardon, in July of 1948.

A. That is about right, sir.

Q. I was confused on those dates myself, Mr. Cosgrove. I beg your pardon. Referring you back to Exhibit E for identification in the Ferrari estate, you received a thirty day extension of [71] time by letter dated October 1, 1947, is that correct?

(Testimony of Lloyd J. Cosgrove.)

A. Is that the date of that exhibit?

Q. That is the date of that exhibit, sir, October 31, 1947, and that was that extension of time which was issued to you by Martin J. Tierney, Chief, Miscellaneous Tax Division; is that correct, sir?

A. He signed the letter, sir. I don't know if I asked him or not, but the letter is mailed to me bearing that signature.

Q. And then the following July, that is July 1948, you went to Mr. Doyle for an extension in the Ferrando estate? A. I think that's correct.

Mr. Gillard: I will ask you to mark this.

The Clerk: Defendant's Exhibit F marked for identification; Defendant's Exhibit G marked for identification; Defendant's Exhibit H marked for identification; Defendant's Exhibit I marked for identification; Defendant's Exhibit J marked for identification.

(Whereupon letter dated November 10, 1948 received and marked Defendant's Exhibit F for identification only; letter to Mr. Cosgrove dated November 19, 1948 received and marked Defendant's Exhibit G for identification only; letter dated January 12, 1949 to Prior & McClellan received and marked Defendant's Exhibit H for identification only; letter dated January 24, 1949 to Prior & McClellan received and marked Defendant's Exhibit I for identification only; [72] letter dated February 7, 1949 to Mr. Cosgrove received and marked Defendant's Exhibit J for identification only.)

(Testimony of Lloyd J. Cosgrove.)

Q. (By Mr. Gillard): Mr. Cosgrove, I will show you five photostatic copies of letters. These are the same letters as were shown to you and identified in the criminal trial, marked exhibits F, G, H, I, and J, pertaining to correspondence that you had with the office of Prior & McClellan, and ask you, sir, if you will identify those as the correspondence you had at the end of 1948 and the first part of 1949 with the accountants you had employed to file the returns in this estate?

The Court: Ferrando estate?

Mr. Gillard: In the Ferrando estate.

The Court: I would like to orient myself on this, Mr. Gillard. Ferrari died in 1946 and Ferrando in 1948; isn't that right?

Mr. Gillard: Ferrari, Luigi Ferrari died August 2, 1946.

The Court: And Ferrando died in April, 1947?

Mr. Gillard: That is correct, your Honor.

The Court: There was that lapse of time in between the two.

Mr. Gillard: That is correct.

The Court: Thus the time for filing the estate tax was that much difference, relatively speaking?

Mr. Gillard: That is correct.

A. I recognize this correspondence, sir. [73]

Q. (By Mr. Gillard): And that is the correspondence you had with that firm of Prior & McClellan, and their correspondence back to you, with reference to the preparation of this return and the Ferrando estate; is that correct, sir?

(Testimony of Lloyd J. Cosgrove.)

A. That is correct, sir.

Mr. Gillard: I will offer those in evidence, if the Court please, to bear the same numbers.

The Court: Very well, admitted.

(Whereupon correspondence between Mr. Cosgrove and firm of Prior & McClellan end of 1948 and first part of 1949 received and marked Defendant's Exhibits F, G, H, I, and J in evidence.)

Q. (By Mr. Gillard): Mr. Cosgrove, you will note, sir, you did note that the last letter in that series was dated February 7, 1949—that was Exhibit I—from Prior & McClellan to you enclosing original and three copies of the tax returns which they prepared in the Ferrando estate, is that correct? A. That is correct, sir.

Q. And then the following day, on February 8, you wrote, (handing the witness Exhibit 1), you wrote a letter to the Ferrandos advising them you had the returns and requested them to come in and sign them, is that correct?

A. That is correct.

Q. You recall when they came into your office to sign those returns? [74]

A. I have no independent recollection of the time. I'd say they came in shortly after that, the date of that letter.

Q. At the time that they came in to sign their returns, did they at the same time, or did Fred Ferrando at the same time make out his check for the payment of the amount of tax that was due?

(Testimony of Lloyd J. Cosgrove.)

A. I don't believe so.

Q. Did he make out that check after he had been in your office to sign the returns?

A. I would say he did.

Q. So that the best of your recollection is that these returns, or this return, rather, was signed in your office sometime between February 8, the date of this letter to Mr. Fred Ferrando, and February 17, the date he wrote that check, is that correct?

A. I would say that the returns were signed in my office approximately a few days after the date of that letter, sir. Now, when that check was written out, I don't know.

Q. Now, sir, after the date that Mr. Ferrando and his mother came to your office to sign this return, you considered that you were still operating under an extension of time granted by Mr. Doyle to file these returns, is that correct?

A. That is right, sir.

Q. And pursuant to that thought on your part you considered that the return was being returned timely pursuant to that extension Mr. Doyle had granted you, is that correct? [75]

A. That is correct.

Q. So that pursuant to that understanding on your part this return could have been dated at the date it was signed by Mr. and Mrs. Ferrando, could it not, and still have been timely filed, according to your understanding?

A. Quite often you secure an extension of time and you date it the day of the extension being

(Testimony of Lloyd J. Cosgrove.)

granted. It is the same way as the Court making an order, a decree is entered in court, and many judges will sign the decree, although it may be presented later, they will sign it the day the order is made. That is the practice in probate in San Francisco.

Q. It was your thought, then, was it, that an extension of time forward to do a certain in the future would be dated not when the act was done in the future pursuant to that stipulation, but rather at the time the original agreement was granted?

A. I had no thought on the subject at the time, so I wouldn't answer, wouldn't attempt to answer that question in that fashion, but I do say this: That in practice a decree is often made in probate court, and I think it is a common practice, the Court decree is made in probate court today and the judge, some of the judges, will sign the order even though it may be presented a week or two weeks later, would be signed the day that the order was made.

Q. You're talking about an act which was done on a certain day, is that correct, to-wit, the granting of the order? [76]

A. That's right.

Q. Now, in this situation, Mr. Cosgrove, isn't it true that the act was done in July of 1947, which was merely the granting of an extension of time; that was the order at that time, wasn't it?

A. That's right, it was a verbal extension of time.

Q. Was it your understanding that when the Ferrandos came into your office in February of

(Testimony of Lloyd J. Cosgrove.)

1949 that they were signing a timely Federal estate tax return? A. That was right, sir.

Q. That is right. Then why, sir, did you not put that date down, that timely date?

A. Why, that is something that we can not answer, why this was done or why the next thing was done. All that we can say is this: That as we look back it probably would have been simpler to do it, to put down the day it was signed. That is probably what should have been done. But it was signed that way, and the thought might have been at the time to make it retroactive to the date the extension was granted.

Now, other than that I have no explanation to make, and other than that the thought did not enter my mind at the time.

Q. Now, sir, was the date July 15, 1948, typed on the return before Mr. and Mrs. Ferrando signed it?

A. I couldn't tell you. If I see that return I might—— [77]

Q. I will show you the original of it, sir.

A. Might refresh my memory. You have reference to the date?

Q. Yes, sir.

A. I couldn't tell you when the date was typed in there, sir.

Q. Now, at the time you received these returns from Mr. McClellan with his letter of February 7, 1949—that's Exhibit J—Mr. McClellan had signed

(Testimony of Lloyd J. Cosgrove.)

his name but put no date on the return, is that correct?

A. I wouldn't know, but it looks to me to be the same typing at the time it was—same typing opposite the signatures of the executor and executrix as the typing before or alongside his name, but I have no recollection or independent knowledge as to when it was signed or whether it was dated at that time.

Q. You were aware, I assume, that return was prepared by Mr. McClellan on February 7, 1949, is that correct?

A. Mr. McClellan's office prepared returns for me sometime in between those dates, or around those dates that's indicated on those letters, sir.

Q. Would you say that according to Exhibit I that that was the date upon which the return was prepared by Mr. McClellan?

A. You are only asking me for an opinion and conclusion.

The Court: Is that important? Sent the return to him with a letter of February 7, 1949.

Mr. Gillard: I will revise the question, if the Court please. [78]

Q. (By Mr. Gillard): Mr. Cosgrove, at whose direction was the—were the words and figures "15th July 1948" typed opposite the signature of Mr. McClellan and above the notarial signature of Ruth Cosgrove?

A. I have no recollection as to who asked that to be done or when it was done, sir. All I can say is

(Testimony of Lloyd J. Cosgrove.)

this: That it appears to me it was done in my office. It was a partnership of Mr. Molinari, Mr. Tinney and myself that composed the office at that time. We assumed the responsibility of the preparation of this return and I say that it was done in our office.

Q. Ruth Cosgrove is your sister, sir?

A. Ruth Cosgrove is my sister; she acknowledged this instrument at my request.

Q. And did she acknowledge it by putting in that date, July 15, 1948, at your request?

A. No, I have no recollection on that, and further, that her writing, she signed this in her own handwriting, and wrote other matters on there, and the date is typed, so I don't think she had anything to do with that date.

Q. So my question was: Did she sign that thing pursuant to your direction in February of 1949?

A. I have no independent recollection as to when she signed it.

Q. Mr. McClellan appear before her?

A. I don't know, I couldn't answer that, but I would say he [79] didn't. I wasn't—I have no recollection on it but I assume he didn't appear before her.

Q. You would assume, I gather, from what you say, that you are responsible for the insertion of the date July 15, 1948, on this Exhibit C, is that correct? A. No, I didn't say that.

Q. What did you say, Mr. Cosgrove?

A. I said my office was responsible for that be-

(Testimony of Lloyd J. Cosgrove.)

cause we undertook to do this work. As to when that date was put on there, as to who put it on there, I have no recollection and I have no knowledge of it.

Q. Do you know whether or not, sir, that that constitutes a change, that date, July 15, 1948, opposite the signature of A. A. McClellan, constitutes a change in the return that was sent to you by Mr. McClellan with his letter of February 7, 1949?

A. Do I know that?

Q. Yes, sir. A. No, I do not.

Mr. Gillard: Will you mark this?

The Clerk: Defendant's Exhibit K marked for identification.

(Whereupon estate tax return for decedent Mario Ferrando received and marked Defendant's Exhibit K for identification only.)

Mr. Gillard: I show you, Mr. Cosgrove, Exhibit K for [80] identification. This was Exhibit 30 in your last trial, criminal trial, and ask you, sir, if that was one of the copies of the Ferrando return that was mailed to you by Mr. McClellan with his letter of February 7, 1949—a photostat of one of the copies that he sent you?

A. I couldn't answer that, sir.

Q. You couldn't answer that, sir?

A. No, I don't know, I have no recollection of remembering what was sent to, what the returns were in 1949 that I received.

The Court: Can you demonstrate by comparison that it is a copy? I mean, is there any need to——

(Testimony of Lloyd J. Cosgrove.)

Mr. Howard: Looks like a working paper; it is in longhand. I don't believe it is a copy of anything that is in the record.

The Witness: I would——

Q. (By Mr. Gillard): Did you see that document at the criminal trial, Mr. Cosgrove?

A. I saw everything at the criminal trial, and I saw more than was presented to me.

Q. You notice it is stamped Exhibit 30. Do you recall seeing that at the criminal trial?

A. I don't recall seeing it, but evidently it was used in the other hearing.

Q. That document which, on the signature page, bears the signature of Mr. McClellan, does it not, sir? [81]

A. It bears a writing of A. A. McClellan. Whether or not he signed it, I wouldn't know.

Q. Will you check and compare that with the Exhibit C in front of you, sir, the original of the estate tax return?

A. To me it looks identical.

Q. Is it your testimony that you never saw that last Exhibit K, you never saw that Exhibit K?

A. That is not my testimony, no.

Q. You don't recall having seen it before?

A. If it was used in the criminal case I evidently saw it, but I have no recollection now that it was presented to me at that time.

Q. Is it your testimony, sir, that the documents, the estate tax returns that were forwarded to you

(Testimony of Lloyd J. Cosgrove.)

by Mr. McClellan were not dated at the time that they were received by you?

A. That isn't my contention.

Q. What is your testimony, sir?

A. Well, I don't want to get into an argument with you. What is your question?

Q. The question is: Was the return which you received, the returns that you received with the letter of February 7, 1949, from Mr. McClellan, were those returns signed and dated by Mr. McClellan?

A. That I couldn't tell you.

Q. They could have been signed and dated?

A. From looking at this, and just casually looking at this exhibit, I would say since it is represented here that this is Mr. McClellan's signature, I say it was signed by him, but it doesn't look like it was dated other than by the typewriter, 15 July, 1948. Now, when that date was put on there I don't know, and I don't know who did it.

Q. You recall whether or not the date February 7, 1949, was erased from that return?

A. I know it wasn't erased, because this paper doesn't indicate any erasure on it.

Q. Now, sir, are you familiar with Treasury form No. 704? That is preliminary notice of estate tax?

A. Have you got a copy there?

Q. I don't have it in the Ferrando case, no.

A. I am not familiar with the form by number, sir.

Q. I will show you, sir, an estate tax preliminary notice, Treasury form 704, which was used in

(Testimony of Lloyd J. Cosgrove.)

the Ferrari estate, and ask you if that refreshes your recollection as to a preliminary notice?

A. Yes, I recognize it now, not by the number, but by the wording of it.

Q. You filed one of those in the Ferrari case, is that correct, sir?

A. It appears that way, sir.

Q. Do you have any recollection whether you filed one in the [83] Ferrando case?

A. I don't think I did. I was told it was not necessary. They never ask for this any more, or didn't ask for it at that time.

Q. You mean after this one was filed they didn't want any more?

A. At this time they didn't want—I shouldn't say they didn't want it, they said it wasn't necessary.

Q. They said it wasn't necessary?

A. That is right.

Q. What is the date of that, sir?

A. There is a couple of stamp marks here; one is December 1, another one is January 21, 1948 and there is another one in January something, 1948. There's about three stamp filed—not filed, but stamp marks on it.

Q. Stamp marks starting in December of 1947?

A. December 1 of—I can't make out the year, sir. Other than that I don't see any date on the paper.

Q. Do you recall, sir, when, under the regula-

(Testimony of Lloyd J. Cosgrove.)

tions, a preliminary notice was supposed to be filed with reference to the date of death?

A. I believe the regulations ask for it to be filed within ninety days, but they say it is not necessary.

Q. Within ninety days after the date of death?

A. But the department up there say it is not necessary to [84] file it.

Q. And this is dated December 1, 1947, stamped as received?

A. I could be wrong on that ninety days, either ninety days or six months.

Q. If you will check the instructions on the reverse side of the form—will you check those instructions on the reverse side of the form and advise me if that is your recollection as to the two month period is your recollection as to the correct time to file a preliminary notice?

A. Is there any particular part of this that you want me to direct my attention to? It is quite lengthy.

Q. There is a little paragraph in there with reference to the time of filing, Mr. Cosgrove. I have my finger opposite it.

A. The instructions on the back of this page says two months after the death.

Q. And if I understand you correctly, the first time that you knew that this form was not required to be filed was when this form in the Ferrari estate was taken down to be filed, is that correct?

A. No, sir, you are wrong.

Q. What was your testimony, sir?

(Testimony of Lloyd J. Cosgrove.)

A. The testimony is that they tell me up in the Collector's office, for a long time told me that it was not necessary to be filed, they do not require it.

Q. You mean they told you that before you filed the estate [85] tax notice in the Ferrari case, the one in front of you?

A. Long before this here notice was ever filed in the Collector's Office they told me this form was not required by them and it's not necessary to be filed.

Q. Long before you took that one down there?

A. Yes, and they tell you that today, too.

Q. Was this the only, of the three estates that were involved in this period of time, the Ferrando, the Ferrari and the Fontana estates, was this the only one in which, the Ferrari, the only one in which you filed that form?

A. What three are you talking about?

Q. Ferrari, Fontana and Ferrando.

A. Fontana has nothing to do with this case.

Q. I am merely asking you that as a question, Mr. Cosgrove. Answer it, please.

A. I couldn't tell you what procedure happened in the other ones, but I can explain this one, if you desire. This, I think, you will find was filed just about the same period of time that the extension was granted. I am reasonably sure you will find that, and if my recollections are correct at the time the request was made for that thirty days extension the preliminary notice was asked to be filed about that same time, and that is the only one that was ever asked.

Q. Now, I will show you Exhibit E, sir, which,

(Testimony of Lloyd J. Cosgrove.)

on October 31, 1947, a month prior to this date, you had already received [86] your thirty day extension of time in the Ferrari case.

A. That is right.

Q. Now, sir, can you tell me why you filed that form 704 in the Ferrari case?

A. Because, as I say after the period of time, around that period of time when this extension was asked and received, the extension, the request then was also made that this form be filled out.

Q. Request was then made? A. Yes.

Q. Did I misunderstand you to tell me they had advised you consistently a long time prior to this that they did not want this form?

A. That is correct, and on this form, evidently when I asked for the extension of time, they gave me the extension of time, they did ask that this preliminary be filled out and filed with them. And as you will notice here the date is, of the extension, was granted to November 2 and this is filed about the first of December.

Q. So then at the time you got the extension of time in the Ferrando case from Mr. Doyle, was a request made of you at that time?

A. No, sir.

Q. That you file a Form 704 in the Ferrando case? A. No, sir. [87]

Q. Mr. Cosgrove, going back to your testimony of a while ago about that date, in the trial of the criminal action, I believe that was 33,214, in the second trial, the transcript at page 831, Exhibit 6—

(Testimony of Lloyd J. Cosgrove.)

I don't believe I have Exhibit 6. Pardon me, your Honor, for just a moment.

Withdraw that question. Exhibit 6 I can't identify at this point.

I have no further questions, your Honor.

Redirect Examination

Q. (By Mr. Howard): Mr. Cosgrove, with reference to the Ferrando estate, at the time Mr. Ferrando and his mother came to you you testified on cross-examination that you did not represent to them that you were an authority on Federal estate tax matters, is that correct?

A. That's correct.

Q. You did tell them at that time, however, that you would do everything required in the course of the probate of that estate, is that correct?

A. I told them I would be happy to handle the administration of the estate for them and that I would do everything required by law to complete the administration, the probate of the will and we would carry it out to completion.

Q. Now, at that time, or in connection with that estate, and also the Ferrari estate, you turned to Messrs. Prior & McClellan for assistance in preparation of those returns? [88]

A. Yes, in the Ferrando case they were in it at the start, and the Ferrari case, they were in the case, too, you might say.

Q. How long had you known Messrs. Prior & McClellan?

(Testimony of Lloyd J. Cosgrove.)

A. The office of Prior & McClellan have been doing tax work for me for ten or fifteen years.

Q. That included the preparation of Federal estate tax returns prior to this time?

A. That is right.

Q. Were they certified public accountants?

A. They are.

Mr. Howard: I have no further questions, your Honor, in connection with the Ferrando proceeding.

The Court: Well, would this then conclude the evidence with respect to the Ferrando case?

Mr. Gillard: Yes, your Honor, I have no evidence to introduce in the Ferrando case.

The Court: I beg pardon?

Mr. Gillard: I have no evidence to introduce in the Ferrando case.

The Court: Then we can conclude that. Now, you want to go on with the Ferrari case?

Mr. Howard: Yes.

The Court: How do you wish to proceed with that? You want to examine the attorney first or put the parties on?

Mr. Howard: Well, I think I can proceed with Mr. Cosgrove [89] at this time, your Honor.

The Court: Well, it is entirely up to you what you wish to do.

LLOYD J. COSGROVE

called as a witness by the plaintiffs, sworn.

Direct Examination

Q. (By Mr. Howard): Mr. Cosgrove, did you

(Testimony of Lloyd J. Cosgrove.)

know Luigi Ferrari prior to the time of his death?

A. I did.

Q. How long had you known him?

A. That, too, goes back about fifteen or twenty years, I would say.

Q. Had you had any professional relationship during that period of time? A. I did.

Q. Did you draw his last will and testament?

A. I believe I did.

Q. Now, at the time of Luigi Ferrari's death, or shortly after his death, did the plaintiffs in this action, George and Edward Ferrari consult you?

A. Yes, they did.

Q. And with reference to what?

A. As I recall it they brought a will in and asked me to take care of the probate of the estate for them.

Q. Did you undertake that employment? [90]

A. I did.

Q. Did you advise them at that time with respect to the obligations which you had undertaken to perform in that connection?

A. Well, I told them that I would carry out the work as an attorney for them in the administration of this estate.

I also advised them that we would call upon them at different times and various times to go to court and they would have to be prepared to sign papers for me as we went along.

Other than that I have no independent recollection of what I might have said to them.

(Testimony of Lloyd J. Cosgrove.)

Q. Did you request information from them from time to time in the course of that?

A. Oh, yes, as we went along we requested from them their appearances in the office to get information from them, and also for documents that they may have that would assist me in the administration of the estate. That went on for a period of time.

Q. Did you obtain from them the matters which you requested of them? A. I did.

Q. Now, Mr. Cosgrove, when did you first discuss the matter of Federal estate taxes, to the best of your recollection, with Mr.—Messrs. Ferrari?

Mr. Gillard: Object to that as assuming something not in evidence. [91]

The Court: You mean, if he did discuss them?

Mr. Howard: Well, let me ask the question this way:—

The Court: I don't quite get the objection.

Q. (By Mr. Howard): In the course of your representation of George and Edward Ferrari, did you discuss the Federal estate tax liability of the estate with them? A. I did.

Q. And when, to your recollection, did the first of those conversations take place?

A. Well, I have no independent recollection as to when they took place, but it is reasonable to assume that I did talk to them, if not at the first meeting, right after that. I am positive that I talked to them after I found out the properties, or I had a good knowledge of the properties that they had,

(Testimony of Lloyd J. Cosgrove.)

but after I secured from them the description of the various properties, parcels of property, I told them about the Federal estate tax that would be involved.

Q. Now, did you undertake and did you prepare a Federal estate tax return for the estate?

A. I did.

Q. Did you ask George and Edward Ferrari to sign a Federal estate tax return? A. I did.

Q. You recall when that occurred?

A. No, I have no independent recollection other than the fact [92] that it was signed by them prior to—signed the Federal estate returns prior to—if I may state, sixteen months after the death of the father.

Q. And where did that take place, Mr. Cosgrove? A. In my office.

Q. In your presence?

A. In my presence.

Q. And was that prior to the time the extension you referred to in your testimony in the Ferrando proceeding had expired, the written extension?

A. Well, in the Ferrari case I secured a written extension for a period of thirty days, and they signed the return, the Federal estate returns prior to the expiration of that thirty day time.

Q. Now, was that a completed return?

A. It wasn't a complete return, no. It could be construed as a complete return, but it wasn't an accurate return, if we could use that expression, because it was true all the properties were included in

(Testimony of Lloyd J. Cosgrove.)

the return, but we didn't have the inheritance tax appraisal on the properties.

So in most cases, in all cases it was just an estimate as to valuations and the liabilities, all the liabilities were not determined within that period of the sixteen months after date of death. So a lot of the liabilities were—I should *not a lot*, but some of the liabilities were eliminated from [93] the return, were not included in the return.

Q. Did you advise Messrs. Ferrari at that time of the extent of the Federal estate tax liability, or the approximate amount involved?

A. Advised the approximate amounts that would be involved, yes.

Q. Do you recall what that figure was?

A. Yes, the—I approximated the tax liability as around \$100,000, and I so advised them.

Q. Did you advise them with respect to the time and the manner of the payment of that liability?

A. Advised them that the tax liability would be around \$100,000 and that if it wasn't paid on date, have to pay interest on the money, I told them that.

Q. Did you explain to them that they would have to pay interest on that money?

A. Have to pay interest on the tax liability, yes.

Q. Now, what did you do with that return after it was signed by George and Edward Ferrari?

A. I delivered it to the office of the Internal Revenue in care of Mr. Doyle.

Q. Now, thereafter did you employ the services

(Testimony of Lloyd J. Cosgrove.)

of Messrs. Prior & McClellan in connection with that return?

A. I would say around that period of time I employed the services of Prior & McClellan, yes. [94]

Q. And at a later date did they furnish you with a completed return?

A. They did. The completed return—the completed return was prepared and I secured it from Prior & McClellan, after we received the report of the State Inheritance Tax Department from whom we got the valuations used on the Federal estate returns.

Q. I see. Now, in that return that was completed by Prior & McClellan, that was eventually filed with the Collector of Internal Revenue, is that correct?

A. Well, that return was sent to me, but analyzed by another attorney, and it was returned to me and then a return was filed with the Collector of Internal Revenue in substitution of the first one.

Q. Now, Mr. Cosgrove, the return that was filed at the Collector of Internal Revenue bears the signature of George and Edward Ferrari?

A. That is right.

Q. Now, do I understand that they signed that return, that their signatures were affixed to that piece of paper in your office in December of 1947?

A. Well, I don't want to be misunderstood. Mr. George and Edward Ferrari signed a Federal estate tax return in my office prior to the expiration of the sixteen month period of time. That return, in-

(Testimony of Lloyd J. Cosgrove.)

complete as it was, was left with the office of [95] Collector of Internal Revenue, and thereafter another return was prepared by Prior & McClellan. It was reviewed by another attorney and another return was prepared by him, and from the two of them the two returns that were prepared by outsiders, the one, and the one that was prepared by me originally, I prepared another return; from the first, the second one and the third one.

Now, whether or not I used some of the sheets of that first one in the preparation of the fourth one, I can't tell you, I don't know, but all I can say is this: I don't know if Mr. Ferrari resigned another one or not, but I can say they signed one and they signed this last one that has been filed.

Q. They did sign a return in your office prior to the expiration of the extension in December of 1947? A. That's correct.

Q. That is correct. Now, did Mr. George and Edward Ferrari consult with you from time to time with respect to the valuations involved in the return?

A. Yes, we did, we talked about that on many occasions.

Q. On many occasions. And when did these conversations commence, do you recall?

A. Well, I'd say practically from the start, right from the early stages of the probate proceedings. They came to my office whenever I requested them to come, and we discussed different phases of the

(Testimony of Lloyd J. Cosgrove.)

estate, and also we discussed the valuations of [96] the estate.

Q. To your knowledge did they participate in any conferences or consult with anybody in your presence with reference to these valuations?

A. Not that I know of.

Q. I see. A. Not that I recall, even.

The Court: When was this last return filed. I am a little confused now.

Mr. Howard: This last return, your Honor, was filed on April 9, 1949, I believe. I am sure it was in the month of April, 1949. I have forgotten the exact date.

The Court: That was about a year and a half after the fifteen month period had gone by?

Mr. Howard: Yes.

The Court: Approximately.

Mr. Howard: Yes; a year and six months, exactly.

The Court: Then he speaks of another return which he doesn't say was filed, left with Mr. Doyle prior to the expiration of that fifteen months, within that period of time in which the one month extension was granted.

Mr. Howard: That is correct.

The Court: Was that filed?

Q. (By Mr. Howard): Well, Mr. Cosgrove, what happened to that return you left with Mr. Doyle? [97]

A. The return was left with Mr. Doyle for his observation and to look it over, and with the ex-

(Testimony of Lloyd J. Cosgrove.)

planation on my part that the return was incomplete and the further reason that we didn't have the money to pay the tax—it was around \$100,000 that was involved in this tax—and the family, Ferrari family, did not want——

The Court: All I want to find out is what happened to that, where is that paper?

Mr. Howard: I will ask the witness what happened to that return, Mr. Cosgrove.

A. Well, I will repeat it, if you don't mind, your Honor, what I just stated.

The Court: I wasn't interested in the conversation, all I am trying to find out is just the simple question, what happened to the paper; was it filed there, was it returned, or what happened?

Q. (By Mr. Howard): Was it filed there and was it picked up then, Mr. Cosgrove?

Mr. Gillard: I will object to the question; counsel is assuming something not in evidence. There is no testimony by this witness this return was filed; I object to the use of that term.

The Court: All I am trying to find out is what became physically of the document.

Mr. Howard: I will substitute the word "left."

The Court: I just want to get a simple answer.

Q. (By Mr. Howard): The return was left with Mr. Doyle's office, is that correct, Mr. Cosgrove?

A. That is correct. But if your Honor would like me to answer your question, I could answer it briefly.

The Court: You can, but all I am trying to find

(Testimony of Lloyd J. Cosgrove.)

out is some physical fact, that's all. The paper was left with Mr. Doyle. What became of that paper after that, that's all I want to know.

Q. (By Mr. Howard): What about that, what happened to that paper afterwards?

The Court: I will leave the rest of the examination to counsel.

The Witness: In the course of time it was thrown away with the rest of the reports as to the portions that were not used or were not needed in this last return that was actually filed.

The Court: Then it must have been returned to you?

The Witness: It was, your Honor.

The Court: What?

The Witness: It was.

The Court: Now, go ahead.

Q. (By Mr. Howard): Now, after the Ferraris had signed the return in your office, Mr. Cosgrove, did you communicate to them anything with respect to your conversations with Mr. Doyle [99] relating to the subsequent change and amendment of that return? A. No, I wouldn't—I didn't.

Q. Now, then, when was the tax paid, to the best of your recollection?

A. I can't recall. I know I delivered the check down to the Collector's Office. Do you happen to have a photostatic copy of that check?

Q. How did the payment of the tax come about?

A. I was delivered—well, I went with the Ferrari boys, two of them, and we went to the Bank of

(Testimony of Lloyd J. Cosgrove.)

America and we made application for a loan. We got sufficient monies from a loan, promulgated by the rentals that were accumulated over a period of time to pay the tax.

So the two boys came to my office, we wrote out a check for the tax liability as set forth in the return.

I took the check, which was in excess of \$100,000 to the office down there and said to Mr. Doyle, "I am prepared now to pay this tax. But in order to have the correct picture of the liability, the valuations should be changed on the return that you have, and also I should be privileged to claim a few more deductions for liabilities."

I started to make the change on the return that he had, which I left with him originally, and as I was writing and making these changes, Mr. Doyle, he says, "You better take it and make a clean job of it." [100]

I took that return and I brought it out to my office and I instructed my girl to prepare a new return, or correct the old return as much as she possibly could, and between that first return and the second prepared by Prior & McClellan and the next one prepared by another attorney, and the memoranda, or the instructions I gave her at that time, the return, final return was prepared in my office and I sent that down to the clerk's office.

The Court: How much time elapsed from the time you first left this return with Mr. Doyle to the time that you finally filed the completed return?

The Witness: I would say approximately a year

(Testimony of Lloyd J. Cosgrove.)

and a half, your Honor. And that was made——

The Court: How long a period of time did Doyle have possession of this document you left with him?

The Witness: I would say for that entire period.

The Court: The entire period of time?

The Witness: I would say that. He called me at different times telling me to clean it up and pay it. My answer to him at all times was that we were not in a position to pay that at this time, but we hoped to have the money shortly. That went on for a long period of time, it is true.

The Court: The payment of the tax was made coincident with the filing of this final return?

The Witness: Yes, your Honor. I took the check down [101] there with the intentions of making corrections on it. I left the check and took the old return out. I sent the new return down to them that same day, as I recall, and I sent them a check for the interest down at the same time.

Q. (By Mr. Howard): You sent him a check for the interest on the liability from the date of the payment, is that right?

A. From the date the payment was due until the date it was paid.

Q. Until it was actually paid.

A. Until it was actually paid.

Q. Had you advised your clients of the necessity of paying interest? A. Yes, I did.

Mr. Howard: I have no further questions.

The Court: Well, before the cross-examination we will take a brief recess.

(Testimony of Lloyd J. Cosgrove.)

(Short recess.)

Mr. Gillard: Did you finish?

Mr. Howard: Yes.

Mr. Gillard: I suppose, to make the record complete, certain preliminary matters which are duplicative should be in this record likewise, it should be deemed to be a separate record, if the Court please?

The Court: You make whatever record you wish to make. [102]

Cross Examination

Q. (By Mr. Gillard): Mr. Cosgrove, with reference to this matter, which is the Ferrari estate, in connection with the questions I asked you before with reference to the Ferraris, did you hold yourself out to be an expert in Federal estate tax matters? A. No, sir.

Q. Did the Ferraris, and when I say the Ferraris, I am referring to George and Edward Ferrari, the executors of the estate of Luigi Ferrari, did they ask you whether or not you were an expert in Federal estate tax matters?

A. I don't think they asked me, sir. They recognized me to be not an authority, but they recognized me to be fully qualified to handle the administration of the estate of their father, though.

Q. Did you discuss with them at any time the fact that it would be necessary to refer out to somebody else the preparation of the estate tax return?

A. I told them, undoubtedly told them I was going to do that, but it wasn't necessary. I have handled lots of them myself without the assistance

(Testimony of Lloyd J. Cosgrove.)

of any so-called experts, but sometimes in order to satisfy a client you go out and you exhaust all remedies to see that the thing is done right.

I knew, and they told me they were very much interested in saving all that they possibly could as far as [103] taxes were concerned; they didn't want to pay out anything more than they had to pay. So I told them that I would consult others and be sure that it was properly filed and properly done, and that they paid the minimum amount of tax.

Q. Do you have an indemnity agreement with the Ferrari brothers, also, Mr. Cosgrove?

Mr. Howard: I am going to object to that question upon the ground, same grounds on which I previously made the objection in the case of the Ferrando estate.

The Court: Overruled.

A. Whether or not it is an indemnity agreement, I think, is a question of law.

The Court: Have you a similar arrangement with the Ferraris you testified you had with the Ferrandos?

The Witness: In substance it is the same, your Honor, excepting this: That from the start I verbally assured them and told them they wouldn't suffer anything because of my conduct, that I would see that they suffered no loss, and I was told by one of the Ferraris just recently they heard I gave a letter out to Mr. Ferrando, or Mr. Aliotto gave it to Mr. Ferrando, and they likewise would want something in writing from me to the effect that

(Testimony of Lloyd J. Cosgrove.)

they would be reimbursed if they had to suffer any loss.

I understand Mr. Aliotto gave such a letter to the Ferraris, and if he did it was with my authorization and [104] permission.

The Court: You authorized it?

The Witness: Surely.

Q. (By Mr. Gillard): Do you know the amount that is involved in this action on behalf of the Ferraris, Mr. Cosgrove?

A. I believe it is in the neighborhood of \$30,000.00.

Q. Yes, sir.

Mr. Gillard: If the Court please, in order to save additional exhibits in the case, you will recall that in the Ferrando matter as Exhibit E I marked one letter of the return in the Ferrari case. Would it be confusing if I asked the entire return be marked as an exhibit in this case?

The Court: You're referring to the letter that was a part of the return?

Mr. Gillard: That is correct, your Honor.

The Court: Now you want to offer the entire return in this case?

Mr. Gillard: Yes, your Honor.

The Court: The Ferrari return. Very well, that will be Exhibit what?

The Clerk: Defendant's Exhibit A in case 34,587; that's Ferrari versus the United States.

Mr. Gillard: For identification.

The Clerk: For identification.

(Testimony of Lloyd J. Cosgrove.)

(Whereupon entire return was received and marked [105] Defendant's Exhibit A for identification only.)

Q. (By Mr. Gillard): I show you Exhibit A for identification, Mr. Cosgrove, and ask you if this is the return, or a photostat of the return that you testified you took to Mr. Doyle in December of 1947 and left with him?

A. I would say part of that is a part of the return that I took to Mr. Doyle in December of 1947.

Q. This return that you have before you then, Exhibit A, is the return, is a copy of the return that was filed in April of 1949, is that correct?

A. That is correct. This is a photostatic copy of the return as filed in 1949.

Q. Now, as I understand the situation, then, it is your testimony that in December of 1947 you prepared a sort of a preliminary type of return which had estimated valuations in it, had that signed by the Ferraris, and took it down and left it with Mr. Paul Doyle in December of 1947, is that correct?

A. I would say that is correct.

Q. And then you went back in April of 1949; that return was still in a basket on his desk?

A. It was on his desk—it was in his possession, anyway.

Q. Now, sir, between those two times you had referred this matter to the firm of Prior & McClellan for the purpose of preparation of a completed return, is that correct?

A. I referred the matter to Prior & McClellan—

(Testimony of Lloyd J. Cosgrove.)

well, you [106] might say for preparation of a return.

Q. And was that subsequent to the time that you received the inventory and appraisement in the estate?

A. I would say it was either subsequent or about that same time.

Q. Do you know when the inventory and appraisement was received?

A. If I might be in a position to state if I was to see the inventory. I have no independent recollection on it, though, otherwise.

Q. I have the estate file, Superior Court estate file, it is file No. 104,168, and without bringing it to you, Mr. Cosgrove, I will advise you that the oath of the appraiser, W. A. Breen, was executed on the 26th of November, 1947. I will show it to you.

A. May I have your question, sir?

Q. Was that the date you received the inventory and appraisement from the appraiser?

A. Looking at this—the proceedings involved in this, in these matters, in the estate matters, is that the attorney prepares the inventory, sends it to the appraiser for his appraisement; the appraiser sets forth on the inventory, the attorney prepares his idea of the valuations. Mr. Breen, on this document, and the oath of appraiser, states that he received it on or about the 26th day of November, 1947. [107]

Q. He received it?

A. That is what he states here.

Q. He received your——

(Testimony of Lloyd J. Cosgrove.)

A. My inventory.

Q. I see. A. For his appraisalment.

Q. Does the file indicate when he returned it to you or filed it? Well, the file indicates when it was filed in the Superior Court; does the return indicate when he returned it to you?

A. No, it wouldn't indicate that, sir.

Q. So then from that file there is no way for you to ascertain when you received the appraisalment?

A. I wouldn't be in a position to tell you, sir.

Q. In any event, sometime after December of 1947 you referred this matter to Prior & McClellan, and they prepared an estate tax return, is that correct? A. That is correct, sir.

Q. Was that return shown to the Ferrari brothers? A. It was, sir.

Q. You recall when that was, sir?

A. No, I wouldn't be—I really don't know. Conservatively stating, I would say it was handed over to them a few days after it was sent to me by Prior & McClellan.

Q. Do you recall what the amount of tax was that was shown [108] on that return?

A. In the neighborhood of \$108,000.00.

Q. \$108,000.00? A. Yes.

Q. Would that, sir, have been around January or February of 1949?

A. I am at a loss to tell you; I don't know, sir.

Q. Do you know when the matter was referred to Mr. Baier, Mr. Baier was the man who prepared the other return?

(Testimony of Lloyd J. Cosgrove.)

A. Mr. Baier prepared one return.

Q. That was after the Prior & McClellan return had been given to you?

A. That is right, sir.

Q. You recall that Mr. Baier, at the last trial, indicated that he was contacted in this matter around February or March of 1949?

A. May I correct that last statement, I think I made a mistake, if I may, your Honor. I don't know if Mr. Baier prepared one or not, but I do know this: That I gave it to the Ferraris and they told me that they showed or gave it to Mr. Baier. I do know that I had received one back wherein it was a revision of Prior & McClellan's report, and the tax, as indicated in that return, was around, in the neighborhood of \$101,000, and it bore the signature, or at least Mr. Baier said he signed that return. Whether or not he prepared it, I [109] don't know, but presumably comes from his office.

Q. Let me put it this way, sir: At the time you received the Prior & McClellan return, whenever it was, at that time that return showed around \$108,000 in tax liability, is that correct?

A. That is my recollection of it, sir.

Q. That was approximately \$8,000 in excess of what you had indicated to the Ferrari brothers the tax would be the previous December, December of 1947?

A. That's right.

Q. Was that difference, that \$8,000, was that what caused them to want the matter to be reexamined by somebody else?

(Testimony of Lloyd J. Cosgrove.)

A. I really can't tell you what caused them to, but they told me that the tax was high, and I told them in my opinion and in the opinion of certified public accountants we had, it was properly prepared, but they were at liberty to take that out to anybody they wanted to and see—let them look it over and see if they can save them any money, I would be happy to work with anyone they selected.

Q. At that time, at the time you were talking, discussing with them the Prior & McClellan return, did they ask you when the return was due, either one of them ask you when the return was due to be filed?

A. No, sir.

Q. Did either one of them, George or Edward Ferrari ever ask [110] you if a return had been filed in the estate prior to April, 1949?

A. I don't believe they ever asked me.

Q. There was an extension of time secured in this case, was there not, sir, to December of 1947?

A. There was a thirty days extension secured.

Q. Until December, 1947?

A. I am not sure, but I think that is what that extension states.

Q. Did either one of those gentlemen, George or Edward Ferrari, ever ask you after that extension was secured if a return had been filed pursuant to that extension?

A. I have no recollection on that, but the facts are the extension was secured, and during that period of time the return was filed. Now, I don't know if I told them that or not, I can't recall whether

(Testimony of Lloyd J. Cosgrove.)

or not I told them, but I am under the impression that subject did not come up.

Mr. Gillard: Will you mark this?

The Clerk: Defendant's Exhibit B marked for identification.

(Whereupon preliminary estate tax notice was received and marked Defendant's Exhibit B for identification.)

Q. (By Mr. Gillard): I show Exhibit B for identification, Mr. Cosgrove. That is that preliminary estate tax notice that I showed you in the other matter.

A. That's right, sir.

Q. Was that executed by George and Edward Ferrari in your office?

A. Yes.

Q. Then how was it filed with the Collector, if you know?

A. I wouldn't know; I don't know.

Q. Do you know if you took care of the filing of it, or either one of the executors did?

A. Either I took care, took care of the filing or someone at my instructions took care of the filing, that is someone in my office, and I might have mailed it down, I am not sure. I have no independent recollection as to when that was signed, why it was signed other than they evidently requested it from me in the Internal Revenue, but how it got to them, I don't know.

Mr. Gillard: I offer Exhibit B in evidence.

The Court: All right, admitted.

What did you do about Exhibit A?

(Testimony of Lloyd J. Cosgrove.)

Mr. Gillard: I was just going to ask about that. I will offer Exhibit A in evidence, if I didn't do so. Any objection?

Mr. Howard: No objection, Your Honor.

The Court: A and B admitted.

The Clerk: Defendant's Exhibit A and B admitted into evidence.

(Whereupon Defendant's Exhibit A and B heretofore marked for identification only, marked in evidence.)

Mr. Gillard: Q. Subsequent to the time that George and Edward Ferrari signed Exhibit B, did they ever make any inquiry [112] of you as to whether or not an estate tax return was filed with the Collector?

A. I am not sure, I don't know; they might have. I don't know.

Q. You have no recollection of it, sir?

A. No, sir.

Q. Do you have any recollection——

A. I do have a recollection of telling them on different occasions, and on many occasions that they better go out and raise some money to pay the tax, because that was a constant annoyance of mine, and I know it was an annoyance to them, too.

Q. Did you ever have, though, sir, do you recall any conversation with either one of the executors with reference to when the return was due?

A. I have no recollection on that subject, sir.

Q. When the return was delinquent?

A. No.

(Testimony of Lloyd J. Cosgrove.)

Q. What the penalty was for delinquent filing?

A. We never discussed penalties or delinquent filings, because that never entered my mind, never entered their mind, and I was assured—not assured, but I knew that I was protecting the rights of the clients because I had a return on file.

We did discuss on many occasions the payment of the tax and the payment of the interest on that estate.

Q. Now, sir, this Exhibit B was executed [113] in your office in your presence, was it?

A. I would say so, because I am of the opinion now all papers pertaining to that estate as far as executors are concerned, were signed in my office.

Q. Did they read the notice, Mr. Cosgrove, in your presence?

A. I doubt it, I doubt it. I don't know, but it is the usual practice to present papers to clients and they sign it when you tell them to sign. You explain what it is, as a rule, but seldom——

Q. At the bottom of the form just beneath their signatures there is appended these words: "Failure to file a required return on Form 706 within fifteen months from the date of death may render executors, administrators, and persons in actual or constructive possession of the decedent's property liable for penalties."

Did they discuss that with you at that time?

A. No, sir.

Q. Ask you any questions about that notice?

A. No, sir.

(Testimony of Lloyd J. Cosgrove.)

Mr. Gillard: I will hand to the Clerk and pursuant to stipulation of counsel ask to receive into evidence the estate tax record of the Collector's office with reference to the estate of Luigi Ferrari which shows, among other things, that this Form 704, which is Exhibit B, was filed on December 1, 1947. The date on the form itself is a little bit illegible, I wanted [114] to put the estate card in to show that date.

The Court: All right, admitted.

The Clerk: Defendant's Exhibit C introduced and filed into evidence.

(Whereupon "Estate Tax Record" Treasury Department Form 842 received and marked Defendant's Exhibit C in evidence.)

Mr. Gillard: Q. Mr. Cosgrove, then after this discussion with the Ferraris about the size of the taxes shown on the McClellan return, Mr. Baier was employed by them, or by you, to prepare a further return?

A. I don't know what the basis of employment, or if there was any employment between them, I don't know. However, I had nothing to do with it at all.

Q. In any event, did you eventually receive from Mr. Baier, copies of a prepared estate tax return in this Ferrari estate? A. I did.

Q. You received how many copies, sir?

A. I don't know; I really don't know.

Q. You received an original and three copies, did you not, sir? A. I couldn't tell you.

(Testimony of Lloyd J. Cosgrove.)

Q. You don't remember that, sir?

A. No, I really don't know if I received it directly from Mr. Baier. I answered yes, but I assume you mean that it came from the Ferraris or from Mr. Baier anyway. [115]

Q. How many copies of the return did you receive from Prior & McClellan?

A. I would say I received about four or five.

Q. Do you recall that you received at least an original and one copy of the return from Mr. Baier, of the return he prepared?

A. I really don't recall. I do know this: That he prepared one, I saw one and I saw his signature on one, but whether or not more than that was delivered to my office or left with me, I couldn't tell you.

Q. How many returns are required to be filed with the Collector?

A. Lately I have been filing one. I think in those days it was common practice to file two.

Q. An original and a copy, is that correct, sir?

A. That's right.

Q. Then there would be at least one copy for your file, is that correct?

A. What case are you referring to now, what specific instance?

Q. Ferrari.

A. I prepared them, I had all the copies. When Prior & McClellan prepared them, it was their practice was to send out, at that time, two to be filed, and at least two more, I would have at least two

(Testimony of Lloyd J. Cosgrove.)

more, maybe three copies. Now, what was done in this specific case, my recollection isn't clear on it other than the fact I received, I would say [116] I received four or five in all.

Q. At the time that you went down to Mr. Doyle's office in April of 1949, to file a return or to take care of this matter you had with you, did you, copies of the McClellan return?

A. I didn't really go down to file, I went down to pay the tax at that time and to correct the one I had there.

Q. I see. Went down to pay the tax.

A. And correct the one he had there.

Q. Did you have in your possession at that time copies of the McClellan return? A. I did, sir.

Q. Did you have in your hands at that time copies of the Baier return? A. Yes.

Q. Is that Baier or Baier?

A. I have heard it both, but I believe it is Baier.

Q. B-a-i-e-r, is that correct?

A. I understand it to be Baier.

Q. Were either of the returns that you had in your possession, that is, the return prepared by Prior & McClellan or the return prepared by Harry Baier, signed by the executors?

A. I doubt it.

Mr. Gillard: Will you mark this, please?

The Clerk: Defendant's Exhibit D marked for identification. [117]

(Whereupon estate tax return on the estate

(Testimony of Lloyd J. Cosgrove.)

of Luigi Ferrari marked Defendant's Exhibit D for identification only.)

Mr. Gillard: Q. I will show you, Mr. Cosgrove, Exhibit D for identification. This was Exhibit No. 29 in the last criminal trial and was introduced to the testimony of Mr. Harry Baier as an office copy of the return he prepared and sent to you. You recognize that document as such, sir? A. No.

Q. You recall seeing it before in the criminal trial? A. I don't recall it, sir.

Q. Will you look at the third page, sir, where it lists the attorneys for the estate and I will ask if that helps to refresh your recollection as to having seen it before?

A. Whether or not I saw this one before I couldn't tell you, sir, but——

Q. Mr. Cosgrove,——

A. But I do say——

Q. Pardon me?

A. I do say I did receive one of these. I know I saw one, might have been more than one.

Q. Maybe I misphrased my question. Is this return which is before you, Exhibit D, to the best of your recollection right now an exact copy of the return that was forwarded to you by Mr. Baier and which you had in your possession when you went to see Mr. Doyle?

A. I have no independent recollection as to [118] what was on that, on the one that I had. I am not in a position to testify whether or not this is an exact copy or not.

(Testimony of Lloyd J. Cosgrove.)

Q. Exhibit A herein, Mr. Cosgrove, contains a copy of the extension of time that was secured in the case, and it also contains a photostatic copy of the will attached to it. With the exception of those two additions, sir, will you tell me what the difference is between Exhibit A and Exhibit D?

The Court: Are they the same? I mean, I don't want to take time to have somebody else compare it. Has somebody compared them, are they the same?

Mr. Gillard: Well, maybe counsel will stipulate with me.

The Court: I would think so. I mean, what is the good of having a man look at two documents and taking time to see whether they are copies or not.

Mr. Gillard: Sheet three, which contains the names and addresses of attorneys for the estate on Exhibit A merely specifies Cosgrove, Molinari and Tinney, and Exhibit D, in addition to those names, contains the name of Harry H. Baier. The return, with that exception, is exactly the same until the signature page, which is sheet twenty-one, and in this Exhibit D that signature page is not filled in. With that exception, counsel having examined them, I think he will find every figure, every appraisal, every item is exactly the same.

Mr. Howard: If Your Honor please, these returns are typed on different typewriters and they contain very extensive [119] descriptions of real

(Testimony of Lloyd J. Cosgrove.)

property, and it would take me hours to compare them to see if they are exactly the same.

The Court: If it is material the comparison can be made. The purpose is to show that the Baier copy is substantially the same as the Exhibit C, which was the return that was finally filed?

Mr. Gillard: Exhibit A, Your Honor; yes.

The Court: Exhibit A, which was the return that was finally filed, is that right?

Mr. Gillard: Yes, Your Honor.

The Court: In other words, your purpose is to establish the fact that the return as filed was the Baier return, putting it colloquially?

Mr. Gillard: That's right.

The Court: Well, the physical facts will speak for themselves. You can argue that.

Mr. Howard: I will stipulate, first of all, that this is a copy of the return that Mr. Baier prepared and furnished to Mr. Cosgrove.

The Court: You will stipulate to that?

Mr. Howard: Yes, I will stipulate also that the—well, I have been through this before, I am quite sure I can stipulate that this return contains substantially the information contained in the return filed by Mr. Cosgrove on April 22, 1949.

I would like the record to show, however, [120] that the information contained in the return filed is not an exact copy of the information contained in the Baier return. It was typed on a different typewriter and set up in a different manner. The infor-

(Testimony of Lloyd J. Cosgrove.)

mation itself corresponds with the exception that counsel for the Government has indicated.

Mr. Gillard: Physical comparison can be made to show it is not an exact—one is not a photostatic copy of the other, but the words and figures are the same; with that exception, is that correct?

Pursuant to that stipulation I will offer Exhibit D in evidence, if the Court please.

The Court: All right.

The Clerk: Defendant's Exhibit D admitted in evidence.

(Whereupon Defendant's Exhibit D heretofore marked for identification only was marked in evidence.)

Mr. Gillard: Q. Now, Mr. Cosgrove, isn't it true that you knew and you now know that the return that was actually filed with Mr. Doyle in April, 1949, with the exception of the sheet three, which contained the names of the attorneys, was an exact duplicate of the copy of the return that was furnished to you by Mr. Baier?

A. As counsel, Mr. Howard stated, the items might be the same on that as furnished by Mr. Baier, but the order is not the same, and we can go further and say that Mr. Baier's report is identical to the report as furnished by [121] Prior & McClellan with the exception of one elimination, one or two eliminations as to property.

Q. That's not the question, Mr. Cosgrove, I didn't ask you anything about the Prior & McClel-

(Testimony of Lloyd J. Cosgrove.)

lan return. The Prior & McClellan return showed a tax liability of \$108,000, didn't it?

A. That is correct.

Q. And this return shows a tax liability of 101 thousand odd dollars?

A. Because that shows there were one or two parcels eliminated from that last——

The Court: What counsel is trying to get at, did you or did you not use the Baier, so-called Baier return, estate return which you filed?

The Witness: I can't answer that yes; the answer is no.

The Court: Well, it shows the same tax liability?

The Witness: Yes, Your Honor.

The Court: Same data was used?

The Witness: The data was used from the Prior & McClellan, and Prior & McClellan got that information from me, except in the last one when Mr. Baier got the report in his hands, he eliminated a couple of parcels of property from the report, and that's the reason for the reduction in the tax liability. Those parcels that were eliminated by that report were subsequently replaced, was put in on the estate return after the audit was made. [122]

The Court: If that is the case, then, they are not copies, they are not the same.

Mr. Gillard: I am sorry, your Honor, I was——

The Court: The witness has just said there were a couple of parcels of property that Baier eliminated in his report, thus reducing the tax. Those

(Testimony of Lloyd J. Cosgrove.)

parcels were, however, included in Defendant's Exhibit A, the return that was actually filed.

The Witness: I am sorry, your Honor, please.

The Court: You didn't say that?

The Witness: I didn't mean it that way, no. The Exhibit A contains the two, the same amount of parcels as used by Mr. Baier, but on audit by the Revenue Agent later they came back and re-inserted it.

The Court: Now you are interjecting something else. Can't we settle this matter? It seems to be a very simple matter, I don't know what the importance of it is, but apparently from what Mr. Gillard said and what the attorneys are willing to stipulate to, the Baier report, return, is the return that was used in Defendant's Exhibit A, the return that was filed. At any rate, physically they are the same except for the differences that have been specified?

Mr. Howard: The information relating to the assets and the computation of tax, and so on, in the return that was filed, Exhibit A, is identical to the corresponding information in the Baier return.

The Court: With some exceptions which have been stated?

Mr. Howard: Yes, with the exception of sheet three, and with the exception of the signature page on the return.

The Court: All right now, we have covered that.

Mr. Gillard: Thank you, Mr. Howard.

Q. (By Mr. Gillard): Now, sir, then at the time

(Testimony of Lloyd J. Cosgrove.)

you went down to Mr. Doyle's office for the purpose of paying the tax, you also went down for the purpose of filing this second return, is that correct?

A. No, sir.

Q. You didn't go down for the purpose of filing a return? A. No, sir.

Q. What was your purpose in addition to paying the amount—incidentally, was the check that you had in your hand at the time you went down to Mr. Doyle's office for the amount of tax shown on the Baier return, which is in your possession?

A. That is correct, the check was in the same amount.

Q. Exactly the same amount? A. Yes.

Q. Now, in addition to going down to Mr. Doyle's office for the purpose of delivering that check, what were you going to do as far as the return was concerned?

A. I was doing nothing with that return other than—I went down for the purpose of conforming the return that he had there with the three returns that I had in my possession. [124]

Q. In other words, your purpose was to conform this return that you say Mr. Doyle had with the copy of the Baier return you had in your hand, is that correct?

A. That is right, plus the return of Prior & McClellan that I had in my hand and plus the original return that I had.

Q. Let's get this straight, Mr. Cosgrove. Was the return that you filed similar to the Baier return

(Testimony of Lloyd J. Cosgrove.)

or similar to the Prior & McClellan return?

A. No, it was similar to the return I had in my hand that I prepared myself. The audit of the properties—I don't know how they were set forth in my original, nor do I know how they were set forth in Mr. Baier's, but I know there was a difference in the manner in which they were set forth.

The Court: We are taking an interminable time to establish a very simple fact. Whatever you may call the returns, what you had in mind doing was substantially making the return that you say was in Mr. Doyle's possession conform in substance to the data contained in the Baier return; whether or not you had other returns, the information set forth in the so-called Baier return you wanted to amend on the face?

The Witness: On the face.

The Court: Of the return that Doyle had.

The Witness: In substance that is correct.

The Court: In substance that is correct?

The Witness: Yes. [125]

The Court: So that was one of your purposes as well as paying the tax at that time?

The Witness: That is correct.

The Court: Now, take it up from there.

Q. (By Mr. Gillard): Mr. Cosgrove, instead of marking up this return you say Mr. Doyle had and then taking it back and retyping it, wouldn't it have served your purpose just as well and been a lot simpler for you merely to have filed a copy of the Baier return you had in your possession?

(Testimony of Lloyd J. Cosgrove.)

A. I didn't consider that. I considered the paper that Mr. Doyle had down there to be the return, and at the same time I am reasonably sure and almost positively sure the Ferrari boys did not sign the Baier return. And also I might add further that Mr. Baier wasn't the attorney for that estate.

Q. Before you went down there to Mr. Doyle's office for the purpose of correcting on its face this return that was filed, you, of course, as the attorney of the estate and doing the proper thing, checked the regulations to find out whether or not you could change that return, didn't you, Mr. Cosgrove?

A. No, I didn't check it.

The Court: Why didn't you take the return you subsequently filed as Defendant's Exhibit A with you and file it in substitution of the other one at the time?

The Witness: Because it didn't have the signatures on it, your Honor. [126]

The Court: I mean, why didn't you get the signatures, or have it signed up and take it down when you sent the check down and say to Doyle, "Put it in place of the other one."

The Witness: Because I thought the other one was filed properly even though the information on it wasn't complete; I thought that it was a proper filing.

The Court: I am not talking about that end of it. Assume it was a proper filing, it seems to me a rather stupid performance to go down there and to correct the other return when you could have

(Testimony of Lloyd J. Cosgrove.)

just simply substituted the one that you wanted to file.

The Witness: Might have been reasons at the time that existed that I didn't want to file it, and, of course, as we all appreciate, hindsight is better than foresight, too.

Q. (By Mr. Gillard): Was the return you say Mr. Doyle had, did he have this return in his desk for this period of a year and half, Mr. Cosgrove?

A. I don't know where he had it for a year and a half.

Q. At the time that you saw it in April of 1949 when you started to make these corrections on it, as you say, was there a filing stamp on it?

A. That I couldn't tell you.

Q. By filing stamp, sir, I mean the stamp which is on the upper right-hand corner of the face of the return which is the space reserved for the stamp by the Collector's office. Is that what you understood that to mean, sir? [127]

A. I understood you to say that.

The Court: Well, they would hardly give him back an official document, because if it was officially marked filed there must have been some record of it in the Collector's office.

Mr. Howard: I might point out, your Honor, the estate tax records counsel offered in evidence indicate that the return was filed on December 2, 1947, for whatever significance that might have.

Mr. Gillard: Are you going to assert that in this

(Testimony of Lloyd J. Cosgrove.)

case, Mr. Howard, as the contention of the plaintiff?

The Court: I am sorry, I didn't get what you said.

Mr. Howard: I was just pointing out counsel offered in evidence an estate tax record which I stipulated was a true and correct record.

The Court: Let me see that. That was Exhibit C?

Mr. Gillard: A.

Mr. Howard: Talking about this record, estate tax record here.

Mr. Gillard: This is taken from Exhibit A, obviously. I want to understand this, if the Court please, I want to find out what Mr. Howard means by this.

Mr. Howard: I am not making any contention on the basis of that at all.

The Court: Got some kind of a mark here, shows it was [128] 12/2/47.

Mr. Gillard: That is correct, your Honor.

Q. (By Mr. Gillard): Mr. Cosgrove, that date the Court just referred to, December 2, 1947, that is the date that appears on the return that you took to Mr. Doyle in April of 1949, is that correct?

A. Will you ask that question over again?

Q. The return that you took to Mr. Doyle in April of 1949, the return in the estate of Luigi Ferrari, is the return which was subsequently stamped "Filed" December 2, 1947?

A. I wouldn't know what it was stamped, sir.

(Testimony of Lloyd J. Cosgrove.)

Q. I will show you the original of the return—this is the original, if the Court please, that I am showing the witness, of Exhibit A which you have. Would you examine that document, please, Mr. Cosgrove? A. Yes.

Q. Is that the document, the physical document in all of its parts that you delivered, and the whole of it, as it is right now before you, is that the document you delivered to Mr. Cosgrove in April, 1949?

Mr. Howard: You mean Mr. Doyle?

Mr. Gillard: Delivered to Mr. Doyle in April, 1949.

A. I would say it is, I have no recollection that good to tell me, but I believe it to be the same one.

Q. And thereafter Mr. Doyle, or somebody in the Collector's [129] office, backdated that return to December of 1947, is that correct?

A. No, that is not correct, sir.

Q. Somebody in the Collector's office put on that return that stamp of December 2, 1947, is that correct?

A. I wasn't present when the stamp was put on, I don't know when the stamp was put on, I don't know the date the stamp was put on, and I don't know this is the original face of the first return that was left with them or if it was the last return. I don't know when it was put on because I didn't see it put on.

Q. Now, I tried to cover that a minute ago, Mr. Cosgrove, and you ducked the question. Now, I will ask you again——

(Testimony of Lloyd J. Cosgrove.)

A. I beg your pardon, I didn't duck anything.

Q. All right, now, since you are now changing the tenor, I will ask you this question: At the time you went back to Mr. Doyle in April of 1949 to make these changes on the return you say you left with Mr. Doyle, was that stamp on there, that December 2, 1947?

A. That I couldn't tell you.

Q. All right.

A. I have no recollection on it.

Q. Then you can not say and you can not so infer to the Court at this point that this might be the same document, is that correct?

A. Will you please ask the question again? [130]

Q. I'll withdraw the question.

Mr. Cosgrove, wasn't the subject of the backdating of this return one of the subjects of the criminal trial in which you were engaged in?

A. Which I was freed of.

Q. That is correct, but I am merely asking you if by virtue of that trial——

Mr. Howard: Your Honor, please, I object to this whole line of testimony.

Mr. Gillard: You raised it, Mr. Howard, you raised it by calling attention to that filing date.

Mr. Howard: That was already in evidence.

The Court: You see, you got me a little confused, Mr. Howard, as to what claim you are attempting to pursue here in this case, whether it is a claim that the return delinquency did not occur or whether or not there is a basis for the refund on the claim that delinquency is excusable.

(Testimony of Lloyd J. Cosgrove.)

Mr. Howard: The basis of the contention here is that we proceeded on the theory that the return was filed, and the claim so states and the complaint so states, on April 22, 1949.

The Court: Well, I take it that you have some more examination, haven't you?

Mr. Gillard: May I just ask this—Mr. Cosgrove said that he was acquitted on these charges, or he was acquitted on the one charge and then he was retried and on which he was [131] convicted and reversed on the ground it was *res adjudicata*, and there is no inference——

The Witness: That was an acquittal.

Mr. Gillard: There was no inference being made on my question to Mr. Cosgrove that there was anything else besides innocence attached to him, I was merely trying to find out by virtue of his knowledge gained in the course of this trial if this wasn't the subject of the trial. I didn't mean to impute anything at all, Mr. Cosgrove, as far as anything else was concerned. But since Mr. Howard has raised this question I will ask for this stipulation from him, and if he will not so stipulate I am going to have to bring over the Internal Revenue Service and we are going to have to repeat the criminal here.

The Court: I am not going to conduct a criminal trial.

Your suit is not predicated upon any claim that the delinquency did not occur, but rather you are advantaging yourself of provisions of the regula-

(Testimony of Lloyd J. Cosgrove.)

tions which allows for the curing of the delinquency, or rather the nonforfeiture in the event that it appears that there was reasonable grounds for delinquency, reasonable excuse for delinquency.

Mr. Howard: That is right.

Mr. Gillard: I would like to further stipulate with counsel that Exhibit A in this case was actually filed in April of 1949.

Mr. Howard: I don't think that that stipulation is [132] necessary; it is in the pleading and admitted by the Government in its answer.

The Court: It is also stated in the pleadings in the complaint.

Mr. Howard: Yes.

The Court: And I assume necessarily that in the claim for refund that the return was filed in April of 1949.

Mr. Gillard: That is true, the complaint says there was filed in April of 1949 a return.

The Court: All you want to establish is that this is——

Mr. Gillard: Exhibit A is what the complaint refers to as filed in April of 1949.

The Court: That has already been admitted in evidence.

Mr. Howard: Admitted in evidence.

The Court: Shows it was filed in April of 1949.

Mr. Howard: Admitted in the answer.

The Court: I will make a finding to that effect now so we won't have to bother about it.

The record is sufficient to warrant a finding at

(Testimony of Lloyd J. Cosgrove.)

this time that Exhibit A is the claim referred to in the suit on file herein and was filed in April of 1949 in the Collector's office. I think that is sufficient to warrant that finding. Have you any objection to that?

Mr. Howard: No objection to that at all.

The Court: Mr. Gillard, it is twenty-five minutes to [133] five; and it is very obvious that we are not going to be able to conclude—do you have some more examination?

Mr. Gillard: I have, if I could be allowed about five minutes I think I could be finished with Mr. Cosgrove and we can excuse him, if the Court will indulge me that long.

The Court: If you want to do that it is all right, but we will have to continue this case, because we can't—

Mr. Gillard: Maybe it would be better then if it goes over and it will give me a chance to re-examine it.

The Court: Now, unfortunately I can't continue the case tomorrow, which I would have liked to have done so that we could have concluded it while it is in our midst rather than after delays, but I have already accepted an assignment to sit in the Court of Appeals tomorrow. I informed the Master Calendar Clerk of that fact and I guess, as sometimes happens, mismeasured the length of time that would be taken. So I can't hear it, finish it up tomorrow, which I would like to do, but I can't be two places at one time.

(Testimony of Lloyd J. Cosgrove.)

Monday, Tuesday, Wednesday, possibly Wednesday, I have another commitment to substitute for Judge Hamlin, who will sitting in a three judge case, so the best I could do, I think, would be for next Thursday. I know it's a long time, but I don't know what else to do about it. Is that all right for both of you?

Mr. Howard: Thursday is all right. [134]

The Court: You want to finish the case and perhaps argue it, and I would suggest that we do go over to that date to prepare just a memorandum, at least, of the authorities so that I can have that, and then you gentlemen could argue it at that time. That would give you time to argue that day, save the time of subsequent preparation of a memorandum.

Mr. Howard: Yes.

The Court: Would that be agreeable to you?

Mr. Howard: Perfectly agreeable.

Mr. Gillard: Yes, your Honor.

The Court: Then we will continue the further trial until next Thursday at 10 o'clock.

(Whereupon an adjournment was taken until Thursday, March 22, 1956, at 10 a.m.) [135]

Thursday, March 22, 1956, Morning Session

The Clerk: Ferrando versus United States for further trial and Ferrari versus United States, further trial.

The Court: I believe that there was a witness on the stand.

(Testimony of Lloyd J. Cosgrove.)

Mr. Gillard: Mr. Cosgrove was on the stand.

The Court: And you had some further cross examination?

Mr. Gillard: Yes, your Honor.

Cross Examination—(Resumed)

Q. (By Mr. Gillard): Mr. Cosgrove, I have placed before you the photostatic copy of the return in the Ferrari estate, Defendant's Exhibit A. I believe last week with respect to this return you indicated that an incomplete return was left by you with Mr. Doyle on or about December 2nd, 1947, and you stated that some of the valuations were missing from that return. The return before you is the one that, as I understand, was actually filed or taken to Mr. Doyle in April of 1949. Now, sir, going through this return, and for the purpose of ascertaining what was contained in the return that was left by you with Mr. Doyle on December 2nd, 1947, may we go through the return as filed and see what the additions have been? First, was the first document under the face of the return—that is, the letter from the Collector of Internal Revenue, dated October 31, 1947, which is an extension of time for thirty days to file the return—attached to the return you left with Mr. Doyle in December of 1947? [136]

A. I have no independent recollection on it, but I would say it was attached to it. I wouldn't know, though, but I believe it to be attached to it.

Q. All right. The next document is a certified copy of the last will and testament of Luigi Fer-

(Testimony of Lloyd J. Cosgrove.)

rari, showing that it was certified as being a true and correct copy by the Clerk of the Superior Court in San Francisco on June 22, 1948. Was another or different certified copy of the will left with the return that was filed and left with Mr. Doyle in December of '47?

A. I have no recollection on it, sir.

The Court: What was the date it was certified?

Mr. Gillard: June, 1948.

The Court: Well, it couldn't have been attached to the one——

Mr. Gillard: No, I asked him if another or different copy of the will——

The Court: Oh.

Mr. Gillard: ——earlier certified was attached to the return and left with Mr. Doyle in December of '47.

A. I have no recollection on that.

Q. (By Mr. Gillard): Do you recall that you secured from the Clerk of the Superior Court an earlier certified copy of the will?

A. I do not recall. I haven't checked my records and I do not know. [137]

Q. If that earlier return had contained a certified copy of the will, when you took that return from Mr. Doyle after making the corrections on it to your office for further preparation, would you not have attached to the copy as filed the same copy of the will you had with the earlier return?

A. I don't know what I would do, but common sense would tell me that I would not have secured another certified copy if I already had one.

(Testimony of Lloyd J. Cosgrove.)

Q. Is it your best recollection, then, Mr. Cosgrove, that with the copy filed with Mr. Doyle in December of '47, there was no certified copy of the will? A. I have no recollection on it, I told you.

Q. Now Sheet 2 of the return contains general information concerning the personal history of the people involved. Is it your recollection that that sheet was completely filled out in the return filed in December of '47?

A. I have no recollection on that question. I have no recollection on, probably, any one of these pages as you go along, sir. This page 2——

Q. Well, pardon me. Go ahead.

A. This page 2 contains the names of certain doctors who attended to the decedent. Now whether or not I had all of them at that time, I couldn't tell you. If we had them all at that time, those names would probably be on that original paper. If we didn't have the names at that time, they would [138] not have been on it. Now whether or not they were, I am not in a position to answer that.

Q. Let's turn to Schedule A, sheet 4, which is the schedule of the real estate, listing a total of six parcels with the valuations for those six parcels. Were any of the valuations shown on Schedule A on the return left with Mr. Doyle in December of '47?

A. Well, we had certain valuations on the sheet that was left. Whether or not they were the same valuations as on this sheet I have here, I have no recollection.

(Testimony of Lloyd J. Cosgrove.)

Q. Now I believe——

A. I am under the impression they were not the same valuations. However, I am not sure of it. I don't know; I have no recollection on it.

Q. Where would you have secured those valuations, Mr. Cosgrove?

The Court: Which ones?

Q. (By Mr. Gillard): The valuations you put on the return and left in December of '47 with Mr. Doyle?

A. The original valuations were only estimates.

Q. Was it your testimony, then, that you believe that certain estimated valuations for the real estate were placed on the return left with Mr. Doyle in December of '47?

A. We had all estimated valuations on it, sir.

Q. Now, when you testified last week that the return left [139] with Mr. Doyle did not have the valuations on it, what were you referring to?

A. I don't think that is my testimony.

Q. What was your testimony, Mr. Cosgrove, with reference to the omissions that were on the return left with Mr. Doyle in December of 1947?

A. What is my answer to that question, counsel?

Q. Yes, sir.

A. The return itself was incomplete. There was various information omitted from it which we did not have at that time. We did not have the money to pay it. The valuations were only estimates that were placed on the properties. Whether or not we had all the information on the original return as

(Testimony of Lloyd J. Cosgrove.)

filed, as we have—as the information we have on this last return, I am not in a position to state.

Q. Let me ask you the question again this way: Do I recall that last week you testified that the return left with Mr. Doyle in December of '47 did not have all of the valuations on it for the reason that you hadn't received the inheritance tax appraiser's report at that time?

A. I do not recall that as my answer. I do recall this, that the valuations on the properties that were originally—on the return as originally filed were only estimates. The valuations placed on this return, the return before me, have been taken from the inheritance tax appraiser's, or the [140] inventory and appraisal which is on file.

Q. All right, sir. Let's turn to Schedule E, sheet 8 of the return, which is a schedule of jointly owned property. There are two pieces of property listed there, the valuations on the one is \$180,000 and on the second is \$48,000. On the return left with Mr. Doyle in December of '47, were there valuations on those two pieces of property?

A. I have no recollection on that, sir. See, you are asking me information in matters that occurred in 1947-48. I can't recall that.

Q. Let's see. Turning to Schedule G, transfers during decedent's life time, three parcels are listed there with valuations of \$15,000, \$25,000 and \$12,000. Were any valuations contained on Schedule G on the return left with Mr. Doyle in December of '47?

(Testimony of Lloyd J. Cosgrove.)

A. I couldn't tell you, sir. As a matter of fact, I couldn't tell you if we had the matter listed that way or not, at that time. Looking at it now, my recollection is this, that that sheet was not filled out in this manner or form. However, I could be in error about that.

Q. Let's turn to Schedule O, sheet 18, Mr. Cosgrove. That sheet is a recapitulation of the assets and allowable deductions showing the total gross estate and the total allowable deductions. Was that sheet filled out on the return that was left with Mr. Doyle in 1947? [141]

A. Well, the sheet, sheet number 18, left with Mr. Doyle was filled out.

Q. It showed the gross estate?

A. Showed a gross estate, yes, sir.

Q. It had a figure in there for the gross estate?

A. That is correct.

Q. It had a figure in there for the total allowable deductions?

A. That is correct.

Q. Well, now, is it your testimony today, Mr. Cosgrove, that the return filed or left with Mr. Doyle in December '47 had some figure for every asset of the estate in it, even though it was an estimate?

A. Every asset that was listed on the return had a figure on it.

Q. Let's turn to Schedule P, sheet 19, the sheet which shows the total gross estate, the net estate and—the net estate. Were those figures filled in on the return left with Mr. Doyle in 1947?

(Testimony of Lloyd J. Cosgrove.)

A. What figures are you referring to, sir?

Q. I am referring to the figure for the total gross estate and the net estate in Schedules P and Q on sheet 19?

A. I would say that there were some figures in there, yes.

Q. And there were——

A. I am positive that it wasn't the same figures as set [142] forth here, though.

Q. All right. The following sheet, sheet 20, is a computation of the tax. Was that sheet filled in on the return left with——

A. Sheet Number 20 was filled in, yes.

Q. And there was a figure inserted in there for the amount of tax due?

A. Some figure was inserted in there, the figure that we wanted, tax we based upon our estimates of value of the properties less the deductions we had or knew at that time.

Q. All right. Then in what respect was the return incomplete, Mr. Cosgrove?

A. In this respect, that we didn't have the check to accompany it at first.

Q. Didn't have what, sir?

A. We didn't have the check, we didn't have the money to pay the tax in the first place.

Q. Where does that show on the return we have been discussing, that you had no money to pay the tax?

A. I think if you will examine this, there is

(Testimony of Lloyd J. Cosgrove.)

some place in here that says the return with the check should be filed.

Q. That is correct, sir, but we have been discussing the information placed on the return.

A. All right. Now——

Q. Where on the return is there a statement that there is [143] no check here?

A. There was no check accompanying it.

Q. I see. Now I will ask the question again, Mr. Cosgrove. In what respect was the return incomplete, the return?

A. The return was incomplete in many respects. The first respect is that there was no check accompanying it; the second respect is that we didn't have all the information concerning the liabilities; and the third, we did not have the valuations of the properties, we only had an estimate of the valuations of the properties. And that's three respects that the return was incomplete. And in those three respects, we explained it to the man that we left it with, with the Internal Revenue Department.

Q. In other words, the return on its face was complete, but you wanted to add further information or change those figures upon the receipt of additional information—for example, from the inheritance tax appraiser as to different valuations or to confirm your valuations—, is that correct?

A. If you want to put it that way, the return was complete, sir.

Q. Now at the time that the executors signed

(Testimony of Lloyd J. Cosgrove.)

this return in your office on October 31, 1947, did they examine that return?

A. I have no recollection, but I doubt it.

Q. Did you go through the return with them and indicate the [144] method by which you arrived at the gross estate and the net estate and the tax due?

A. My policy is always if they don't want to read it or if they wouldn't want to read a document or paper of this nature, I would explain every item on the page. I don't mean to say I would explain the regulations or anything; I would explain the inserts in most of the cases and the manner or the way in which we determined the tax liability.

Q. Am I correct in assuming, sir, when in my last question I asked you when they signed the return in October 31, 1947, that is the date they signed the return?

A. I would just assume it was the date that they signed it too. I have no independent recollection as to when they did sign it.

Q. Did they ask you if this was, this return was going to be filed? A. I doubt that.

Q. Did they ever ask you if the return had been filed? A. They might have.

Q. Do you recall if they did, sir?

A. I have a recollection that they did ask me. When or where or how or under what circumstances, I don't recall now. But I am under the impression now that they did ask me.

(Testimony of Lloyd J. Cosgrove.)

Q. And do you recall, sir, that you told them it had been filed? [145]

A. I would have told them that, yes.

Q. Did you, sir?

A. I don't recall. I say I have a faint recollection of them asking me that. If they asked me that question, I would have told them yes, it was filed.

Q. Now, sir, I will place before you Defendant's Exhibit B, which is the preliminary estate tax notice, and ask you when that was signed by George and Edward Ferrari.

A. I have no recollection when it was signed. It was signed during the period of the administration, though.

Q. Was it signed before or after the estate tax return was signed?

A. Well, I note it was signed before the estate tax return, or about the same time or prior thereto; but I have no independent recollection when it was signed.

Q. Either before or after?

A. It appears to me to bear their signatures, and I am reasonably sure I wouldn't ask them to sign it after the estate tax return was filed.

Q. Did you indicate on our last session that that preliminary notice had been signed after the extension of time was received, because this was an unusual situation—you said the preliminary notice was not ordinarily asked for, only in connection with an extension of time, and that it was after

(Testimony of Lloyd J. Cosgrove.)

you had received the extension of time that that preliminary notice [146] was asked for?

A. I don't remember my testimony last week as far as this paper is concerned, other than in this respect, that it is my recollection that this paper was signed by the two Messrs. Ferrari in my presence. I said it was a rather unusual thing, because they do not ask for this paper up in the Internal Revenue Department. As a matter of fact, they tell you you don't have to file it. I assumed at the time that this properly was asked of me to be signed because I asked for an extension of time. Now that's my recollection of what took place. That's my recollection of my testimony last week, and that's my recollection today.

Mr. Gillard: Would you mark this for identification?

The Clerk: Plaintiff's Exhibit 1 marked for identification.

Mr. Gillard: No, wait a minute. We are the defendants.

The Clerk: Oh, I am sorry. Defendant's Exhibit E marked for identification.

(Whereupon carbon copy of letter dated 10/22/48, further identified below, was marked Defendant's Exhibit E for identification only.)

Q. (By Mr. Gillard): Mr. Cosgrove, I will show you a rather tattered carbon copy of a letter dated October 22, 1948, and ask you if this was Exhibit Number 5 in the criminal trial and ask you if

(Testimony of Lloyd J. Cosgrove.)

you recall having received that [147] communication, the original of that communication.

A. I don't recall this.

Q. You have no recollection of that, sir?

A. No, sir. This letter is addressed to Ferrari in care of Cosgrove, Molinari and Tinney. Whether or not we received the original or if we received this, I have no recollection at this time. I don't know if I received that or not.

Q. Do you have any recollection at any time of discussing with the Ferrari brothers the problem of filing a return after or pursuant to the notice of preliminary return, which is Exhibit B, I think, before you?

A. May I have your question?

Q. Was the question as to when a return was going to be filed pursuant to that preliminary notice of estate tax return discussed with either of the executors?

A. I couldn't answer that now. I don't know.

Q. After the expiration of the thirty days extension of time which had been secured and which expired December 2, 1947, did you discuss with the executors the necessity for filing a return after the expiration of that extension?

A. My recollection is that I discussed with them many times their raising the money to pay the tax, and I always told them that I estimated the tax to be in the neighborhood of \$100,000. I would not have discussed with them the necessity of filing any return, because we considered the return was [148] already filed.

(Testimony of Lloyd J. Cosgrove.)

Mr. Gillard: Will you stipulate as to this, whether it was—(Balance of conversation among counsel out of hearing of the reporter).

Mr. Howard: I don't know what the relevancy is.

Mr. Gillard: Will you stipulate it may go in?

Mr. Howard: Yes.

Mr. Gillard: By stipulation, Exhibit E for identification may be admitted into evidence.

The Clerk: Defendant's Exhibit E admitted and filed into evidence.

(Whereupon Defendant's Exhibit E for identification was received in evidence.)

Q. (By Mr. Gillard): Sir, after this return was left with Mr. Doyle in December of '47, did you examine the statutes or the regulations for the purpose of ascertaining your power or right to amend that return?

A. No, sir, except other than what—other than by interviewing Mr. Doyle.

Q. And did Mr. Doyle advise you that the return could not be amended, but that only supplemental information could be submitted?

A. No, sir, he did not.

Q. He did not advise you. What did he advise you, Mr. Cosgrove? [149]

A. Take it out and make the corrections and bring it back.

Q. That was in April of 1949?

A. That's right, sir.

Q. Prior to the time you went to his office and started to scribble on that return and make those

(Testimony of Lloyd J. Cosgrove.)

corrections, had you talked with Mr. Doyle with reference to your right or power to amend that return?

A. I talked to him on a few occasions or several occasions during that interim period, but never discussed with him the province or the obligations or the extent of his authority or my limitations, either. Our conversation was confined at all times to, "When will you bring the money in to pay the tax on this estate?"

Q. And did you at any time make an examination of the statutes or the regulations to ascertain what your power was to amend or alter that return?

A. I didn't believe that I had any occasion to do it and I never did it, because naturally I relied upon the office of the Internal Revenue Department.

Q. And did Mr. Doyle, you say, prior to April of 1949, advise you you had the right to amend that return?

A. No, sir, he did not advise me.

The Court: You said from December of '47 to April of '49 it took the executors to raise the money to pay the tax?

The Witness: The answer I can give you, your Honor, is [150] this, that as soon as the money was raised, as soon as the money was secured, we went and paid the tax. I don't think an honest attempt was made at the start to get the money. I may be mistaken in that.

Q. (By Mr. Gillard): Well, Mr. Cosgrove, the money that was used to pay this tax was borrowed, was it not?

(Testimony of Lloyd J. Cosgrove.)

A. Money was borrowed from the Bank of America, supplemented by the accumulation of rents that was received from the property, which was used in the payment of tax.

Q. How much was borrowed from the Bank of America? A. I couldn't tell you.

Q. \$90,000? A. Probably so.

Q. And the tax was \$100,000. Did you have any discussion—

A. Are you asking me that question, sir?

Q. Yes. Was it around \$100,000?

A. I think the taxes paid—

Q. Well, the return shows it. I will withdraw the question. The return shows the tax.

Did you have any discussion with George or Edward Ferrari—Withdraw the question.

When was your first discussion with George and Edward Ferrari with reference to the fact that they should get a loan to pay the estate tax?

A. I couldn't tell you when that first came up, but I can [151] tell you that within six months after the date of death of Mr. Ferrari, I told them that they had to go out and make arrangements to secure some money to pay the taxes. We discussed over and over, off and on—I don't say within six months, but I do say that over the period of the administration, we discussed selling properties, borrowing on the properties and trying to secure the money under an unsecured note. Eventually the money was secured from the bank on an unsecured note.

(Testimony of Lloyd J. Cosgrove.)

Q. All right. Then in December or October of 1947, when this return was made out and left with Mr. Doyle and you advised the executors that the tax was in the neighborhood of \$100,000, at that time was there any discussion as to when that should be paid?

A. I have no recollection as to me saying when it had to be paid, other than the fact that I told them that it had to be paid with the filing of the return, and if they didn't get it, they would have to pay interest on it.

Q. Did you urge them to attempt to get a loan at that time to pay the taxes?

A. No, I didn't urge them to do anything.

Q. Did they ask you at that time as to the advisability of getting a loan to pay the taxes?

A. They might have, but I have no recollection at this time. [152]

Q. When was the subject of the payment of the tax, when did that next come up after December of 1947?

A. From December of 1947 up to the time it was paid, it came up at different and various occasions.

Q. How many times, sir?

A. Oh, I don't know; half a dozen or a dozen.

Q. Half a dozen or a dozen times? A. Yes.

Q. And were the conversations in general along the same lines in all instances?

A. I would say they were. I have no independent recollection of the conversations, but I would say

(Testimony of Lloyd J. Cosgrove.)

they would be the normal things to discuss and in the normal thing would be along the same lines.

Q. What was the general tenor of those conversations with reference to payment of the tax?

A. The general tenor is that as long as the tax is not paid, they are paying interest on that money at six per cent.

Q. You told them it was six per cent, sir?

A. Yes.

Q. And that was the extent of the conversation on those inquiries?

A. Well, I have no recollection of the conversations, but I say that is—that was the major part of the conversations and the point that was of most interest to all of us was the [153] getting of that money, raising of the money to pay the taxes. Now we had other conversation, many conversations, such as accompany an attorney and client relationship, that they would have in the administration of an estate of half a million dollars. We don't only talk on one subject, you talk on various subjects. And it is all in line with your duty as an attorney representing the executors.

Q. Well, of course I am not asking you, Mr. Cosgrove, for all your conversations with reference to the estate, but merely with reference to the payment of tax. Now you indicate that on half a dozen or a dozen occasions you had a conversation about it and the general tenor of those conversations in every situation was that they would have

(Testimony of Lloyd J. Cosgrove.)

to pay the tax some time, in the meantime they are paying six per cent interest, is that correct?

A. That is the general tenor of the conversations.

Q. Was there anything in particular which prompted them to get a loan in 1949 to pay these taxes?

A. What prompted them to get a loan?

Q. Yes, sir.

A. I don't know what was in their mind, but I can say I urged them to go out and get the loan at that time.

Q. At that time?

A. Because I knew their financial position was sound, I knew that, I was reasonably sure that in view of the fact that they [154] didn't want to put a mortgage on the property, nor did they want to sell a parcel of property. I felt at that time their credit would stand a loan, and we went and talked to the Bank of America and asked the bank if they would give us an unsecured note or loan for the amount and the bank came back in a few days, a few days later, and said it was all right.

Q. Was their credit also sound in December of 1947?

A. No, they had—I'd say it was very sound at all times. Whether or not it was sound for financial institutions to grant a loan of \$90,000 is a matter of opinion. At that time there was expenses involved, there was debts of the decedent, and we didn't know the extent of what they may be. In

(Testimony of Lloyd J. Cosgrove.)

my opinion, their chances were not as good to get a loan, an unsecured loan of \$90,000, in December as it was a year and a half later.

Q. Did you urge them at any time to attempt to get a bank loan prior to April of 1949?

A. Yes, many times we discussed it?

Q. I say did you urge them, sir?

A. What do you mean by urging?

Q. Did you suggest they do it?

A. I suggested that they do it.

Q. Did they ever do it?

A. I might qualify that word suggest. I told them the means of getting it would be to get a mortgage on the property. [155]

Q. Did they ever tell you——

A. I didn't urge them to get a mortgage at any time.

Q. Did they tell you at any time prior to April of 1949 that they had attempted to get a bank loan?

A. I don't recall any conversation on that subject.

Mr. Gillard: I have no further questions.

Redirect Examination

Q. (By Mr. Howard): Just one question, Mr. Cosgrove. The return in the Ferrari estate the government has offered in evidence indicates that the tax liability is \$101,031.31.

A. That is right.

Q. Now as I recall your testimony, you testified that at the time this tax was paid, you paid the interest on it to the date of the payment, is

(Testimony of Lloyd J. Cosgrove.)

that correct? A. That is right, sir.

Q. Do you recall how much that——

A. The interest?

Q. Do you recall how much the total amount of money was?

Mr. Gillard: Is this it, in the complaint?

A. I think it was around \$110,000.

Mr. Howard: No, just talking about the interest on the tax. I don't think the complaint makes reference to the interest.

A. (Continuing) There were two checks prepared on this same date, one in the amount of \$101,031.31 and the other one was [156] in the neighborhood of \$8,000 to \$10,000. I think that check is here as an exhibit, I am not sure.

Q. (By Mr. Howard): So that the total amount of money paid at that time included both the tax and the interest, is that correct?

A. Right up to date.

Mr. Howard: I have no further questions.

The Witness: Pardon me. I was going to say, subsequently on audit, this tax, the tax liability was increased and naturally with the increase, Ferrari estate paid the increased tax liability plus interest on that.

Mr. Howard: No further questions, your Honor.

The Court: Is that all? That is all, is it, Mr. Gillard?

Mr. Gillard: That is all of this witness, yes, sir.

The Court: You may step down.

(Witness excused.)

The Court: Gentlemen, I am going to take up some criminal cases, and then we will resume this. You have two witnesses in the Ferrari case?

Mr. Howard: Yes, your Honor, just two witnesses.

The Court: Well, then, we will reconvene—I want to take a little recess and hear these two criminal cases—at 20 minutes past 11.

(Recess.)

Mr. Howard: Your Honor, Mr. Gillard has indicated he was [157] willing to stipulate that if Mr. Cosgrove were recalled to the stand, that he would testify that in 1932 or thereabouts, he tried a case before the United States Board of Tax Appeals, and at that time, at least, he had a treasury card to practice before the Treasury Department.

Mr. Gillard: As I recall, that was the only case he had tried before the Board of Tax Appeals.

Mr. Howard: That is correct.

Mr. Gillard: So stipulated.

The Court: Very well.

Mr. Howard: George Ferrari, would you take the stand, please?

GEORGE FERRARI

called as a witness on behalf of the plaintiffs, was duly sworn and testified as follows:

The Clerk: Please state your name to the Court, sir.

The Witness: George Ferrari.

(Testimony of George Ferrari.)

Direct Examination

Q. (By Mr. Howard): Mr. Ferrari, you are one of the plaintiffs in this proceeding, is that correct?

A. Yes.

Q. You are the son of Luigi Ferrari?

A. That's right.

Q. Who died in San Francisco on April 2nd, 1946—August 2nd, 1946, is that correct? [158]

A. Yes, sir.

Q. Where were you born?

A. Born in San Francisco.

Q. And when? A. December 23, 1912.

Q. And were you educated in this city?

A. Yes, sir.

Q. And did you go to grammar school here?

A. Yes, sir.

Q. And where did you go to grammar school?

A. Saint Charles Parochial School in the Mission District.

Q. And did you go to high school?

A. Yes, sir.

Q. Where did you go to high school?

A. Galileo High School.

Q. Did you graduate from high school?

A. Yes, sir.

Q. Did you have any education beyond that time? A. No, sir.

Q. Now, Mr. Ferrari, at the time your father died in 1946, what business were you engaged in?

A. In the wholesale produce business.

Q. And was that your father's business?

(Testimony of George Ferrari.)

A. Yes, sir.

Q. And how long had you worked in the business at that time? [159]

A. Oh, I started in 1933.

Q. And what were your duties in connection with the business?

A. Well, it would be buying produce and getting to market in the early morning, and we would do our own work. We worked all day, delivering produce and—Well, we would just deliver it, and my father and my brother and I all worked together.

Q. And how many employees were engaged in the operation of this business?

A. Well, we had no employees. We did it ourselves.

Q. And by "ourselves," who do you mean?

A. My dad and my brothers, that's all.

Q. How many brothers did you have at that time?

A. There was two brothers and myself and my dad.

Q. And you did all the work in connection with the business?

A. Everything, yes.

Q. Now did you have any employment prior to the time that you went to work in your father's business?

A. Well, I sold newspapers.

Q. And when did you start selling newspapers?

A. When I was about five years old.

Q. In San Francisco?

A. Yes, I sold them out on Seventh and Mission here, outside the federal building.

(Testimony of George Ferrari.)

Q. And you sold newspapers up to the time you went to work [160] for your father?

A. Well, I quit selling papers just before I went to high school. Then when I went to high school, I would help my father out during vacation and Saturdays and stuff like that.

Q. Now you have no education beyond your high school education, is that correct? A. No, sir.

Q. Did you ever go to business school?

A. No.

Q. Now how long have you known Lloyd Cosgrove, Mr. Ferrari?

A. Well, I met him when I was working for my dad out in the Mission District. I was introduced to him one day, my dad said he was the——

The Court: He just wants to know when it was.

A. Well, I guess it must have been prior, probably 1933, '34 or '35, around that time, I guess.

Q. (By Mr. Howard): And at the time that your father died in 1946, then you had known Mr. Cosgrove ten or twelve years, is that it?

A. Yes, that's right.

Q. Now you were named in your father's last will and testament as a co-executor of the estate, is that correct? A. That's right.

Q. And when did you first find that out?

A. Well, Mr. Cosgrove—we went to his office and he said, [161] “You fellows are the executors.” That's all. And he read the will out.

Q. When did that occur?

A. After my father passed away.

(Testimony of George Ferrari.)

Q. How soon after your father passed away?

A. I couldn't say. Maybe it might be two days, three days, one day, might have been a week. I really don't know.

Q. It was a few days after your father died, is that correct?

A. That's right.

Q. Now at that time did you have any discussion with Mr. Cosgrove about the administration of your father's estate?

A. Yes, I didn't know, first time I ever heard of executors so I didn't know what the job was. So he just told us that he would handle the estate and then he would tell us from time to time what to give him and we would bring down to him, like deeds and insurance papers and leases on the property and anything we can find of any value to the estate.

Q. And from time to time he made requests of you for various documents?

A. Yes.

Q. And deeds and so on, in connection with the estate?

A. That's right.

Q. Now at that time that you were appointed executors of the estate, did you have any familiarity with the duties of an executor other than what Mr. Cosgrove told you? [162]

A. No, none whatsoever, no.

Q. You had never been an executor prior to that time?

A. No, I didn't know what it was, myself.

Q. And you never had any—did you have any connection with the probate of any other estate

(Testimony of George Ferrari.)

prior to that time? A. No, nothing.

Q. Now, Mr. Ferrari, getting down to the substance of this proceeding, when did Mr.—when did you first become aware of the liability of the estate for federal estate taxes?

A. Some time in 1947.

Q. And about what time was that?

A. Well, it was a little after a year after my father passed away, around the holidays, sometime around the end of 1947.

Q. And how do you fix that time in your mind?

A. Well, he certainly never had much time in the estate at that time, and he—there was a few things that he wanted from our accountant at the time and we had brought him in and he was even rushing him at the time. It was near the end of the year.

Q. Did he call you into his office? A. Yes.

Q. And did he explain why he called you into his office?

A. Well, he said he never had much time on the estate, his time was almost up, and he told us about the liability, the tax would be about \$100,000. [163]

Q. And at that time did he tell you about a federal estate tax return?

A. Well, he mentioned something pertaining to that fact, about estate taxes.

Q. And you recall at that time signing any document? A. Yes.

Q. Was it represented to you as an estate tax return?

(Testimony of George Ferrari.)

A. It was something to that effect, he says estate tax papers.

Q. Now, Mr. Ferrari, I show you here a document which is in evidence in this proceeding as Defendant's Exhibit D, which purports to be the estate tax return of the estate of Luigi Ferrari, and I ask you if you have ever seen that document.

A. Oh, it is something like this here.

Q. You saw something like this?

A. Yes, sir.

Q. When was the first time to your recollection you saw that?

A. It was sometime in 1947.

Q. I see.

Mr. Howard: If your Honor please, I intended to refer to Defendant's Exhibit A, which is a photostat copy of the original return filed in the estate.

The Court: All right.

Q. (By Mr. Howard): Now I show you this document, Mr. Ferrari, [164] which is Defendant's Exhibit A, which is a photostatic copy of a federal estate tax return, and I ask you if you had seen the original of that document, would your answer be the same as with respect to the return I showed you a minute ago? A. I think so.

The Court: Well, he signed it, did he not?

Mr. Howard: What's that?

The Court: He signed it.

Q. (By Mr. Howard): Now calling your attention, Mr. Ferrari, to sheet 21 of this document, is that your signature on there?

(Testimony of George Ferrari.)

A. That is my signature.

Q. George Ferrari? A. That's right.

Q. And do you recall when you signed that document?

A. Some time in '47 near the end of the year, like I told you.

Q. This document indicates it was signed on the 31st day of October, 1947. Would that be about the time you signed it to the best of your recollection?

A. The best of my recollection, it would be, yes, sir.

Q. Now you testified that at that time you had a conversation with Mr. Cosgrove relating to this return and the amount of tax that was involved, is that correct? A. That's right.

Q. And what did he tell you about the amount of tax involved?

A. He says about \$100,000. We told him what the tax was, [165] he told us it was about \$100,000. And "Gee," I said, "Holy—what was the—never thought it would be so much money," I said. "There's no money in the estate to pay that kind of tax," I told him. And then he talked about, he was going to get an extension of the time, he said, and then when we, probably when we, after we borrowed the money, we would pay the tax and we would have to pay six percent interest. He went along those lines there.

Q. And now, Mr. Ferrari, in this return there is a Schedule K, debts of the decedent, which I call to your attention, and you will note the first item

(Testimony of George Ferrari.)

there is federal income tax, \$9100. A. Yes.

Q. Do you recall the payment of that?

A. Well, I thing that is the time the accountant was—Cosgrove was always pushing him about he wanted the debts on the federal income tax. I know the accountant at the time was working, figuring up what the tax liability was to give to Cosgrove.

Q. Now I call your attention to the other items on this Schedule K, debts of the decedent, and ask you if you as the executor of the estate paid those items that are listed there. A. That's right.

Q. And they total \$24,983.96, is that correct?

A. Yes. I don't know what the total is, but I know we paid them out. [166]

Q. Now I call your attention to Schedule J, funeral and administration expenses.

A. M-hm.

Q. You see there, there is executors' commission of \$3600. A. M-hm.

Q. Attorney's fees of \$4600. A. Yes.

Q. Funeral expense of \$2,000. A. Yes.

Q. Cemetery of \$1700. A. Yes.

Q. And that column totals \$13,757.02.

A. Yes.

Q. Now did you pay those obligations as the executor of the estate?

A. Yes, had to pay everything.

Q. Now, Mr. Ferrari, do you recall any conversation with Mr. Cosgrove with reference to the inventory and appraisement of the estate?

A. What do you mean?

(Testimony of George Ferrari.)

Q. A document in which the valuations of the properties were set forth?

A. Well, he gave us the appraisal prices.

Q. And when did that occur?

A. After we had signed that estate tax papers there. [167]

Q. Now how long after?

A. I don't know. Might have been—Who knows? Might have been—I wouldn't say. May be a week, two, three, four, five, six, seven; I don't know.

Q. I see. A. I wouldn't know.

Q. Would it be in the early part of 1948?

A. It could probably have been '48.

Q. And did you have a discussion with Mr. Cosgrove about those valuations?

A. Yes. Gee whiz, I thought they were kind of high, those there. So there was one piece of property there that I thought that was too high, so I told Mr. Cosgrove about it and he says, well, there's nothing he can do about it, "But if you can get somebody who is a competent real estate man, like the man who has been collecting your rents, like Madison and Burke," they manage the property, and he said, "If you get somebody down there to talk to the appraiser, and maybe if they can do anything, they will do something for you." And then I told him, it was too late to do anything like that, and he says, "No, you can still make the change," he said he can still make the changes. So I had Mr. Dempsey of Madison and Burke contact the fellow who was the appraiser and then they—

(Testimony of George Ferrari.)

well, I don't know what took place, but there was one piece they did get the value down on about \$20,000. [168]

Q. Who was the appraiser at that time?

A. Green.

Q. Mr. Breen?

A. Something like that—Breen or Green. I think it was Breen.

Q. Breen, yes. Now you contacted Mr. Dempsey, was that it?

A. Yes. He is the boss down at Madison and Burke.

The Court: I don't see the materiality of going into this matter.

Q. (By Mr. Howard): Mr. Ferrari, now at the time Mr. Cosgrove informed you of the amount of tax that would be involved, federal estate tax that would be involved in this estate, did you discuss the matter of the payment of it?

A. Well, we talked about it, but there was no money in the estate at the time, so what he said, "You will have to—all these outstanding bills, you just keep paying them off and then when there is a little money in the estate, we can go to the bank and try and get a loan from the bank," he says, and which we did in 1949.

Q. Did he tell you about when the tax had to be paid at that time?

A. There was no mention of when I had signed the estate tax papers at the time.

Q. Did he say anything to you about interest?

(Testimony of George Ferrari.)

A. Yes, he mentioned interest, yes. [169]

Q. What did he say about it?

A. Well, he said, "It will cost you six percent interest," he says, "when you pay the tax." He mentioned something like around one half of one percent or—which was six percent, he said. He says, "When you pay the tax," he says, "you will have to pay six percent interest." I said that was all right.

Q. And now what did you do about raising money to pay the taxes then?

A. Well, there was so many bills to pay, I mean there was a lot of money got to be paid out, and so we just, every month when the—well, when the rent moneys come in, we had a special account in the bank, see, that everything that came in was deposited in the Bank of America, through a special account in the bank that was the estate account. And all the money went to the estate account and then when there was, then as the bills come in, we would pay off the different bills.

The Court: There weren't any mortgages on these, this estate?

The Witness: What's that, your Honor?

The Court: There were no mortgages?

The Witness: Oh, yes, there was about \$50,000.

The Court: In mortgages on some of the parcels?

The Witness: Yes, that's right, Judge, your Honor.

Q. (By Mr. Howard): Well, now, did you discuss with Mr. [170] Cosgrove obtaining a bank loan on the property?

(Testimony of George Ferrari.)

A. We discussed about it.

Q. When did these discussions take place?

A. Well, the first time we talked, I think,— I don't remember now. I know we discussed about when he had told us about the tax being about \$100,000, and I don't know whether we discussed about that before or not. We probably did. But the main time was in 1947, we discussed. We owed a lot of money. I mean, there was no possible way that you can probably raise that money there. So when he had said that we would build up the estate fund and when the time comes to make an arrangement for a loan, then we would go to the bank and borrow the money to pay off the tax with the six percent interest.

The Court: You didn't make any independent efforts to borrow this money; you relied on what Attorney Cosgrove told you as to the difficulty of getting money at that time?

The Witness: I think so. I didn't quite——

The Court: Well, I will ask it a little more simply. You yourself did not attempt to get any money, borrow any money from the bank until 1949, is that right?

The Witness: That's right.

The Court: You were relying upon Cosgrove's statement that it would be difficult to get the money, borrow any money until the estate had proceeded further, had got more [171] money into the estate?

The Witness: Yes. Well, he had told us in '47.

The Court: Well, I know, but it is because you

(Testimony of George Ferrari.)

relied on what he told you in that regard that you didn't make any efforts to actually make a loan from the bank until '49?

The Witness: Well, I think so.

Q. (By Mr. Howard): Well, now, Mr. Ferrari, when did you first become aware of the fact that the federal estate tax return was due fifteen months after the day of your father's death?

A. That was 1948.

Q. What time in 1948?

A. Some time in 1948. I couldn't place the exact date.

Q. And how did that come about?

A. Well, my neighbor, I had my neighbor next door, we used to go over and talk and he had a pool table in his basement, and——

The Court: Well, do we have to go into all the details? Can't he say how he found out? Somebody told you that?

The Witness: Yes.

The Court: Who was it told you?

The Witness: My neighbor next door. He found, he got me an estate tax return and that's my—seeing it there,——

The Court: That is the first time; it was because some neighbor told you in '48, that was the first time you say you [172] became aware that the return had to be filed in fifteen months?

The Witness: That's right.

The Court: Is that correct?

The Witness: Yes.

(Testimony of George Ferrari.)

The Court: Cosgrove never told you that?

The Witness: Not in '47. I found out in '48 about it.

The Court: All right.

Q. (By Mr. Howard): Now Mr. Demartini—was that his name? A. That's right.

Q. And did he get a federal estate tax return for you? A. Yes.

Q. And did you look at it then? A. Yes.

Q. Was that the first time you were aware of the fact that the return was due in fifteen months?

The Court: He just said it was.

Q. (By Mr. Howard): Now what did you do then, Mr. Ferrari?

A. Well, I went back to Mr. Cosgrove's office and I told him about it, it says here about fifteen months and he never told me about fifteen months, I told him. And then he wanted to tell me, he knew all about the fifteen months. He says, "You didn't have the money to pay at the time. There was no money to pay the tax. But when you do pay," he says, "you will pay six percent interest when you pay the tax." That's [173] all I wanted to know. He never told me before.

Q. Now, Mr. Ferrari, did Mr. Cosgrove tell you that he had filed a federal estate tax return?

A. He told me. He did tell me.

Q. When did he tell you that?

A. When I went back and told him about the fifteen months, that's when he mentioned that he had a return on file.

(Testimony of George Ferrari.)

Mr. Gillard: He had what? May I have that answer, Mr. Reporter?

(Record read.)

Q. (By Mr. Howard): Now, Mr. Ferrari, when did you first become aware of the fact that there were possible penalties involved in this situation?

A. Well, I went to see another attorney in 1949—his name was Harry Baier—and he told me there might be a penalty.

Q. How did you happen to go see Mr. Baier?

A. Well, this neighbor of mine, you see, his father-in-law, Mr. Baier worked on his estate.

The Court: Is that material? This is a case to recover a refund on the tax. Can't you just develop the simple fact that he did go to another attorney? How he went there is immaterial. What do you want to bring out, what the attorney told him?

Mr. Howard: No, I was just trying to bring out that Mr. Ferrari—what his knowledge of this situation was and [174] how he first became aware of this situation.

The Court: Well, he first became aware of it, he has already told us that; now you want to develop that some attorney told him about the penalties. Why don't you just ask him the direct question to save time? Some attorney by the name of Baier you went to in what year, 1949?

The Witness: '49.

The Court: And do you know when that was?

The Witness: Around March, I guess.

The Court: And what did he tell you?

(Testimony of George Ferrari.)

The Witness: He said there might be a penalty on the estate.

The Court: All right.

Q. (By Mr. Howard): Then what happened?

The Court: That is the first time you knew about the penalty?

The Witness: Correct.

The Court: All right.

Q. (By Mr. Howard): Then what did you do?

A. I went back and told Mr. Cosgrove and Mr. Cosgrove said, "There will be no penalty." That's all. I told Cosgrove, he said there would be no penalty.

Q. Did he explain why?

A. He just said, "There will be no penalty." Says, "Everything is all right," he said to me. [175]

Mr. Howard: I see. I have no further questions.

The Court: Mr. Gillard, did you have in mind any extensive cross-examination? I am just trying to regulate the time element involved.

Mr. Gillard: It will be a lot longer than fifteen minutes, if that is the question.

The Court: Well, I thought maybe we had— Then you have one other witness?

Mr. Howard: Mr. Ferrari's brother, the other co-executor.

The Court: Will it be about the same tenor?

Mr. Howard: Same general testimony. His testimony shouldn't be as long, because——

The Court: All right. Then that would conclude the testimony?

(Testimony of George Ferrari.)

Mr. Howard: Yes.

The Court: You were planning to make some oral presentation in the case, oral argument?

Mr. Howard: Well, I just plan to make a very brief oral presentation. I have prepared a trial memorandum for you, your Honor.

The Court: Well, then, I would suggest that we recess until 1:30.

Mr. Gillard: Let me ask the witness just two preliminary questions,—

The Court: All right. [176]

Mr. Gillard: If the Court please, it may control what I want to do over the lunch hour.

Cross Examination

Q. (By Mr. Gillard): Mr. Ferrari, as I understand your testimony, you signed some kind of a tax return in 1947, is that correct?

A. That's correct.

Q. You know that was an estate tax return?

A. Well, it was a federal estate tax paper or something similar to federal estate tax return.

Q. Well, this Exhibit B, estate tax preliminary notice, is an estate tax paper, Mr. Ferrari. Is that what you have in mind as having been signed?

A. No, I remember signing that too.

Q. And you have a recollection, then, sir, of signing an estate tax return in 1947, is that correct?

A. Yes, sir, correct.

Q. Now did you ever thereafter sign any other estate tax return?

(Testimony of George Ferrari.)

A. I don't have no recollection.

Q. Did Mr. Baier prepare an estate tax return at your request?

A. Well, not at my request. I told him to.

Q. Well, did he prepare a return,—Mr. Baier?

A. He prepared a return.

Q. Yes. And you saw the return he had prepared? [177]

The Court: He has already testified he did.

Q. (By Mr. Gillard): You saw that return, sir? A. Yes.

Q. Didn't you sign that return?

A. No, I never signed that return.

Q. Did you ever tell Mr. Baier you'd signed that return?

A. I told Mr. Baier I never signed it.

Q. You told Mr. Baier you would never sign it?

A. That's correct.

Q. Did you ever tell Mr. Baier that you had signed it? A. No, I never told him that.

Q. Well, now, Mr. Ferrari, when you are referring to a return,—

Mr. Gillard: This is not—

The Court: Well, you may want to pursue this further. I think perhaps we might recess now until 1:30.

Mr. Gillard: Well, at this time, if Your Honor please I will file the memorandum for the government that you asked about last week.

The Court: Have you got a memorandum too, counsel?

(Testimony of George Ferrari.)

Mr. Howard: Yes.

The Court: I wonder if you would just let me have it now so I may look at it while I am eating lunch. [178]

(Document passed up to Court)

(Whereupon a recess was taken until 1:30 o'clock)

1:30 O'clock, Afternoon Session

Q. (By Mr. Gillard): Mr. Ferrari, at the time that you first contacted Mr. Cosgrove with reference to the estate of your father, did you make any inquiry of him as to his abilities with reference to federal estate tax matters?

A. No, I just, we went to him, my father passed away and, well I mean, there was—Well, you see, we live in the Mission District and Cosgrove—

The Court: Well, all he wants to know is whether you made inquiry on that subject.

A. No, I didn't.

Q. (By Mr. Gillard): Now there came a time, I gather, when in the course of the administration of the estate, that you went to Mr. Cosgrove's office and you signed some estate tax papers, is that correct?

A. That is correct.

Q. And that was to the best of your recollection in the fall of 1947?

A. Yes, that's right.

Q. You were shown Exhibit A a little while ago, the estate tax return, with your signature on it, and the date preceding that signature is October 31, 1947. Did you sign the return on that date?

A. Around that time. [179]

(Testimony of George Ferrari.)

Q. Around that time? A. Yes, sir.

Q. Well, at that time, as I recall, you said——

The Court: That is the return that was filed in April '49?

Mr. Gillard: That is correct, Your Honor.

Q. (By Mr. Gillard): That's the return that you were shown, the return that was filed in April of '49, is that correct?

The Court: Well, it shows on its face that it was filed,——

Mr. Gillard: Oh.

The Court: ——in 1949.

Q. (By Mr. Gillard): At that time, at the time that you signed your name to an estate tax paper of some kind, did you also sign this estate tax preliminary notice, Exhibit B?

A. No, I don't remember. I can't remember. I did sign this here, I think it was before we signed those papers there.

Q. You think you signed this preliminary notice before you signed an estate tax return?

A. I think so.

Q. Are you sure of that, Mr. Ferrari?

A. Well, to the best of my recollection. It was around that time there, but if it was the same day, I wouldn't remember.

Q. Do you recall that you testified in a criminal proceeding, in a criminal action against Paul V. Doyle and Lloyd J. Cosgrove? [180]

A. M-hm.

Q. And you testified in that case in June of

(Testimony of George Ferrari.)

1952? A. I guess it was around that time.

Q. Do you recall this testimony at that time, Mr. Ferrari:

“Q. I show you now Government’s Exhibit Number 1 and ask you if you can identify the signature George Ferrari and Edwards Ferrari that appear on there. “A. Yes, I remember this.

“Q. Now when did you sign that, Mr. Ferrari?

“A. It was about the same time, I think.

“Q. Was it on the same day?

“A. I am pretty sure it was. I remember seeing at the same time this \$400,000, just kind of drew my attention, see \$400,000. And that is why I remember this here.”

Do you remember that testimony, Mr. Ferrari?

A. I—Well, I kind of remember it a little bit, when I testified at the trial.

Q. And the \$400,00 you are referring to——

A. Yes.

Q. ——was the \$400,000 stated on this Exhibit B as being the amount of the gross estate?

A. Yes, that’s right, I think that’s right, I think it is. Well, it was around that time. It was around that time, like I just explained to you. [181]

The Court: Was there a date on it, is there a date on this?

Mr. Gillard: I don’t believe there is a date on that, no, sir.

The Witness: Whether it was the same day or——

Q. (By Mr. Gillard): “Q. Your recollection is, then, that you signed Government’s Exhibit

(Testimony of George Ferrari.)

Number 1, the preliminary notice, at the same time you signed Government's Exhibit Number 2, the estate tax return? "A. I think I did."

Is that the truth of the situation, Mr. Ferrari?

A. I think it was around the same time.

Q. The same day?

A. Well, I wouldn't say the same day, but around that time.

Q. Now at the same time was there a discussion about an extension of time?

A. There was, yes.

Q. What was the discussion with reference to that?

A. Well, Mr. Cosgrove said at that time he didn't have much time left on the estate and his time was almost up and then he mentioned about the tax being around a hundred thousand dollars and that's when we said there was no money in the estate to pay the tax at the time, because there was so much money owing out. And then he did mention [182] about he was going to get an extension at that time, where, as we had paid the tax later, we would pay six percent interest.

Q. Now when he talked about getting an extension of time, what kind of extension of time were you talking about? A. On the payment of tax.

Q. An extension of time to pay the tax?

A. Yes.

Q. You weren't talking about an extension of time to file the return?

(Testimony of George Ferrari.)

A. Well, I didn't—It didn't occur to me at the moment about the return.

The Court: Well, did he ever tell you that he got an extension of time?

The Witness: Well, he did mention he was getting an extension.

The Court: No, that is not what I asked you. Did he tell you that he had gotten an extension of time for you?

The Witness: That I don't remember.

The Court: You don't remember whether he told you?

The Witness: Well, I thought——

The Court: Do you remember how much time you were talking about that he was going to get an extension for?

The Witness: He didn't mention no time limit; just says get an extension.

The Court: Get an extension; but as far as [183] you know, you don't remember whether he ever told you whether you got an extension?

The Witness: Well, I just went by what he told me.

The Court: Did you ever ask him whether he got the extension later on?

The Witness: No, I just said that one time there that I told him in '47 when he said he was getting an extension. That's all there was to it. I never told him any more.

The Court: Well, then, let's get your answer clear so there is no question about it. You never

(Testimony of George Ferrari.)

asked him thereafter and he never thereafter told you whether he did get an extension or not?

The Witness: That's right.

Q. (By Mr. Gillard): Now at the time you signed this form in front of you, this Exhibit B, you read that before you signed it, did you, Mr. Ferrari? A. No, I didn't read it.

Q. You glanced at it? A. That's right.

Q. You glanced at it and you saw the \$400,000 figure? A. That's correct.

Q. Did you also see the bold face print printing at the bottom of the form right under your signature? A. No.

Q. Will you read that, please, the bold [184] face printing at the bottom of the page? Would you read it out loud?

A. "Failure to file the required return on Form 706 within fifteen months from date of the death may render executors, administrators and persons in actual or constructive possession of the decedent's property liable for penalties."

Now I didn't even see that.

Q. Didn't see that, sir? A. No, sir.

Q. Now When Mr. Cosgrove told you the tax was going to be in the nature of a hundred thousand dollars, you thought that was pretty high, did you?

A. Well, I thought it was pretty high.

Q. And did you want at that time to get some other help from some other tax attorney or some other specialist to see if that tax could be cut down?

(Testimony of George Ferrari.)

A. Not at that time.

Q. Not at that time? Why not?

A. Well, I didn't know nothing about those there things at that time.

Q. You knew the tax was going to be \$100,000?

A. Yes.

Q. You weren't concerned at that time about the amount of \$100,000, is that correct?

A. Well, it was—it come so quick that he [185] told us just out of a blue sky and it almost knocked us over for a loop. And he said he'd have to have these estate tax papers in, he said, his time was running short and he says the taxes is \$100,000, and we couldn't dig up any money at a moment's notice to pay the taxes in the short time.

Q. Eventually there was another tax return prepared by the accounting firm of Prior and McClellan, is that correct? A. I think so.

Q. And you were shown that return, were you not?

A. Well, I don't remember. There was — I don't remember the time.

Q. Do you remember you saw a return prepared by Prior and McClellan?

A. Well, Cosgrove mentioned something about Prior and McClellan, but I didn't know the people, though.

Q. When did you go to seek advice yourself about trying to get some return prepared which would show less than a hundred thousand dollars?

A. Oh, I just—Mr. Cosgrove told me——

(Testimony of George Ferrari.)

The Court: No, he just asked you when it was that you did that.

A. Oh, I think——

The Court: See, it is very hard to follow you if you don't answer the question. You can explain them afterwards, but you talk about something else in answer to the question. [186]

A. I think it was 1949.

Q. (By Mr. Gillard): 1949. So that the first time you took any action at all on your part to try to have this estate tax reviewed and see if it was possible to get a lesser tax was in 1949?

A. That's right.

Q. Now, sir, I will hand you Defendant's Exhibit E and ask you if you ever saw the original or a copy of that letter before.

A. No, I never seen this letter there.

Q. Did Mr. Cosgrove ever tell you that he had received a communication from the Internal Revenue Department asking where the return was?

A. No.

Q. What is the date of that letter, sir?

A. October 22, 1948.

Q. Isn't October, 1948 approximately the time you saw Mr. Demartini?

A. I wouldn't remember. It was some time in 1948.

Q. Are you able to say, sir, that you did not see Mr. Demartini around October of 1948?

A. I wouldn't say it was October, '48.

Q. It could have been?

(Testimony of George Ferrari.)

A. It might have been, but I am not—I don't remember.

Q. It could have been any time in 1948 up [187] to and including October, is that correct?

A. It could be.

Q. And at that time Mr. Demartini told you something about the fact that a return was due to be filed in fifteen months after your father's death, is that correct? A. No.

Q. What did he tell you, sir?

A. Well, we talked, just talked about the taxes, that's all. I told him that my father's estate, I said the taxes are about a hundred thousand dollars, I told him, and he says, and then I told him that we were paying interest when we pay the taxes, I told him. And so he told me that he had an estate tax return upstairs in his room, he had from his father's—his father-in-law's estate. So then he told me if I wanted, if he wanted to get me one. I says, "It's all right," I says, "Go ahead," I told him.

Q. Didn't you discuss with him at the time the time when the return was supposed to be filed?

A. No.

The Court: I thought you said a little while ago when your own attorney was examining you that that was the first time that you learned that an estate tax return had to be filed within fifteen months.

The Witness: When he got me the return, I seen it on there. He didn't tell me. [188]

(Testimony of George Ferrari.)

The Court: Well, it was as a result of your discussion?

The Witness: Yes, he got me an estate tax return.

The Court: So you looked at it and you saw it had to be filed within fifteen months?

The Witness: Filed and tax paid within fifteen months, that's right.

The Court: All right.

Q. (By Mr. Gillard): So at that point, then, you saw on that return there was a requirement it had to be filed within fifteen months after death?

A. That's right.

Q. And then you went to Mr. Cosgrove and asked him whether or not you didn't have to file a return within fifteen months. is that correct?

A. Who?

Q. You went to Mr. Cosgrove then to ask him about this fifteen months business?

A. No, I told Cosgrove, he never told me about the fifteen months. That's all.

Q. Did you ask Mr. Cosgrove whether a return had been filed?

A. He told me he had a return on file.

Q. This was after you had this conversation with Mr. Demartini?

A. Yes, that's right, yes.

Q. And that was the first time you knew [189] anything about whether a return had or had not been filed?

(Testimony of George Ferrari.)

A. Return filed and about the payment of the tax that's right.

Q. Will you answer my question, please, sir?

Mr. Gillard: Would you read the question back, Mr. Reporter?

(Record read)

A. Well, I knew I had signed the return that this Demartini gave me, I had remembered I had signed the similar paper in 1947 in Mr. Cosgrove's office.

The Court: Are you sure that you signed an income tax estate return in October, 1947?

The Witness: Something similar to the one I seen.

The Court: Are you sure you signed it, now?

The Witness: Well to my best recollection, that's as far as I can remember. This is when Cosgrove, he told, said to sign the estate tax papers, and I just took it for granted, that's all.

The Court: Well, go ahead, counsel.

Q. (By Mr. Gillard): Now as a matter of fact, when you went to see Mr. Cosgrove on that occasion, Mr. Cosgrove told you that he had the return on file?

A. He says, "I have a return on file," he said.

Q. "I have the return on file?"

A. He says, "I have a return on file." [190]

Q. "I have a return on file?"

A. That's correct.

Q. And is that what you testified to in the last trial, the criminal trial?

(Testimony of George Ferrari.)

A. I don't remember.

The Court: Well, you can't ask him that. Read it to him.

Q. (By Mr. Gillard): Do you remember this testimony? Oh, one further prior question. Did you ever at any other time discuss with Mr. Cosgrove the question of whether or not the return had been filed or whether you should file the return?

The Court: You mean any other time except this?

Mr. Gillard: Except this occasion after the Demartini conversation.

A. That's all I can remember, Mr. Gillard.

Q. (By Mr. Gillard): Now do you recall this testimony in 1952:

"Q. Do you remember what Mr. Baier told him?

"A. Oh, about fifteen months, about the tax being paid fifteen months, and I had already explained to Mr. Baier about that. We were to pay an interest on the taxes, see, and I told him that there was a time, one time when I remember Mr. Cosgrove did tell me that he had to return the file, see, and, but we were to pay the tax and you can always make some changes, see, maybe at a later date. Maybe [191] you can always make a change." Do you recall that testimony, Mr. Ferrari?

A. I am trying to remember it. He did mention that he can make changes on the return.

Q. Yes. And at that same time he told you that he was going to file the return some time, didn't he? A. File the——?

(Testimony of George Ferrari.)

Q. He was going to file the return?

A. I don't remember him——

Q. He never told you he had filed the return, did he?

A. Said he had one.

Q. Some time prior to October of 1948?

A. Well, on that discussion that time, I had with him, he said he had a return on file. He said he knew all about the fifteen months, he told me. He says, when you haven't got the money to pay the tax, but when you do pay the tax, you will pay it with six per cent interest.

Q. How much interest did you pay the bank for the \$90,000 loan?

A. I guess around about, around \$9,000 or \$10,000, I guess.

Q. How much interest did the loan bear?

The Court: What was the rate of interest?

The Witness: Six per cent.

The Court: To the bank?

The Witness: No, wait, let's see. It was, I think it [192] was five per cent. I think it was five per cent; I am pretty sure.

Q. (By Mr. Gillard): All right. Now as I understand your testimony with reference to the payment of the tax itself, it was your idea to wait until some money had accumulated in the estate and then with that money plus what you could borrow, you would pay for the tax that was due on the estate, is that correct? A. Yes.

Q. Were you then in a better position with reference to the moneys in the estate in April of

(Testimony of George Ferrari.)

1949 than you were in December of 1947?

A. That's right.

Q. You were, sir.

Mr. Gillard: May this be marked for identification, the Superior Court file 104-168?

The Clerk: That's Defendant's Exhibit F marked for identification.

Mr. Gillard: I am referring only to the account of the executors, if the Court please, in that file. I showed you this, didn't I?

Mr. Howard: Yes.

(Whereupon Superior Court file was marked Defendant's Exhibit F for identification.)

Q. (By Mr. Gillard): I am showing you, Mr. Ferrari, the [193] estate file in the estate of Luigi Ferrari, on file with the Clerk of the Superior Court in and for the City and County of San Francisco, File Number 104-168, and referring you therein particularly to the first and final account of executors, which was filed together with your petition for settlement of the first and final account, and for final distribution, on May 16, 1949; and call your attention to the account and the recapitulation on there. Is that the account that you filed at that time?

The Court: Well, obviously it is.

A. I don't know. I don't know about these.

The Court: Ask him some other questions.

A. I don't know nothing about this stuff here.

Q. (By Mr. Gillard): That recapitulation shows, does it not, Mr. Ferrari, that during the

(Testimony of George Ferrari.)

course of your administration of the estate, you collected in cash \$56,122.26 and spent \$113,145.04 for a deficit of \$57,022.98?

A. Well, I guess whatever is there. I don't know much about those things.

Q. Is that what the account shows?

A. If it's right there, I guess. I don't—

Q. And the account shows that the final payment that was made prior to the rendition of the account was a payment made on April 24, 1949?

A. What's that for? [194]

Q. It was to your mother for the family allowance. A. How much?

Q. I didn't say the amount. Was that the final payment made prior to the rendition of the account?

The Court: Does it appear to be on the account?

Mr. Gillard: Yes, your Honor.

The Court: Then I don't think you need to ask.

The Witness: What's that for? My mother collected—You mean this here?

Q. (By Mr. Gillard): Yes, sir.

A. To Rose—

Q. Referring to the last item on the account.

A. I guess so. I don't know nothing about those things there.

Mr. Gillard: I will offer the final account into evidence from that Exhibit, if the Court please.

The Court: Admitted.

(Whereupon final account from Defendant's

(Testimony of George Ferrari.)

Exhibit F for identification was received in evidence.)

The Court: You'd have been better off to have borrowed this money from the bank in 1947. It would have cost you a lot less money; you would have got a lower rate of interest. You would have had the obligation all paid off.

The Witness: There is quite a few bills, there was a lot of money owing, though. I don't know how you could pay the bills off. [195]

The Court: You had a deficit in your account in 1949, and still the bank gave you the money. The obvious reason for that is that a lot of money went out for family allowance and other things. The bank wasn't particularly concerned about that as far as making a loan was concerned.

The Witness: Well, family allowance, I think, was about \$500 a month.

The Court: Well, go ahead.

Mr. Gillard: I think that's all, your Honor.

Redirect Examination

Q. (By Mr. Howard): Mr. Ferrari, you were engaged in business with your father prior to the time of his death; you testified to that effect?

A. Yes, that's right.

Q. And there was your father and your brother George and a third brother, is that correct?

A. Well, there was Anthony.

Q. Anthony? A. Anthony.

Q. And when did Anthony die?

(Testimony of George Ferrari.)

A. He died November, 1945, about six or seven months before my father died.

Q. I see. So that up to the time of Anthony's death, there were the four of you running the business?

A. Yes. [196]

Q. And then when Anthony died, that left three?

A. Yes, sir.

Q. And then after your father died, you and your brothers, or your brother George, carried it on?

A. Well, I am George.

Q. I mean your brother Edward and you carried on with the business yourselves?

A. Yes.

Q. Now what time did you go to work in the morning?

A. We go to work about 4:30 or 5 in the morning.

Q. And when is your work finished?

A. Oh, in the afternoon around 4 o'clock.

Q. I see. And who drives the trucks in the delivery of the merchandise?

A. My brother. He does most of the heavy work and I do most of the lighter work.

Q. Now, Mr. Ferrari, did you ever know Paul Doyle?

A. No.

Q. You knew him at no time involved in this proceeding?

A. Huh?

Q. You did not know him at the time?

A. No, I never knew that fellow.

Q. Did you ever personally have any contact with anyone in the Internal Revenue service relat-

(Testimony of George Ferrari.)

ing to your federal estate tax return prior to the time that it was filed? [197]

A. Nobody.

Mr. Howard: No further questions.

The Court: Mr. Ferrari, is your mother living?

The Witness: My mother is pretty sick right now. She has got pneumonia.

The Court: She is still alive?

The Witness: Yes, she is pretty——

The Court: She was the sole heir of the estate?

The Witness: Yes.

The Court: The whole estate went to your mother?

The Witness: That's right. That is why I couldn't understand——

The Court: And she had some property of her own in addition, did she not?

The Witness: Not—my mother had to pay the while thing. She was married fifty-five years to my father, and when my father passed away, my mother had to pay on the whole estate to get the whole thing back again—for fifty-five years.

The Court: Does she have property of her own?

The Witness: Well, I am—I mean she worked and she was supposed to have some property, and they didn't give it nothing. They took it all away from her. I mean, she had nothing. She had to pay on the whole estate.

The Court: I am not quite clear what you mean by that. [198] When your father died, this estate

(Testimony of George Ferrari.)

was appraised at about \$500,000, as I understand, or \$400,000.

The Witness: Yes, that's right, your Honor.

The Court: A lot of real estate, and the business.

The Witness: My father was out of business at the time of his death.

The Court: You boys were—at the time of his death the business belonged to the boys?

The Witness: Just—my father died and my——

The Court: All I am trying to find out is, at the time of your father's death, the business belonged to you and your brother?

The Witness: That's right, yes, your Honor.

The Court: And did your mother have money or property besides that which was in the estate?

The Witness: No.

The Court: When your father died?

The Witness: No.

The Court: Well, your mother advanced certain moneys to the estate in order to pay obligations, didn't she? Where did she get that money from?

The Witness: You mean—I explained, we had, my mother had to pay on the whole estate. There was nothing hers; she paid on the whole estate and there was money owing. You see the way it was, the deeds of the property—— [199]

The Court: What you are saying doesn't help me at all. All I am trying to find out, your mother apparently advanced some money in order to get the estate closed up. I gather that from the account.

(Testimony of George Ferrari.)

The Witness: Yes, she had borrowed, had to borrow the money from the bank.

The Court: She personally got money from the bank, is that the way she handled it?

The Witness: Well, I had to go—Well, Cosgrove went to the bank and made the loan to pay the taxes off.

The Court: No, that isn't what I am talking about. In the account it shows that the executors paid out a lot more money than they received, and you also say in the account which I read that your mother, the sole legatee of the estate, advanced the money for the payment of these amounts, so that's where you as executors got the money to pay off these various things, is that right, or do you know that?

The Witness: I don't know.

The Court: I don't think it has any particular materiality to this matter, but I was just trying to get the whole picture of the estate. You don't know that?

The Witness: I don't know what you are talking about, that's the only trouble.

The Court: Anything else?

Mr. Gillard: Just one or two further questions.

Recross Examination

Q. (By Mr. Gillard): Mr. Ferrari, during the pendency of the estate you had to file income tax returns each year as executors for the income tax and the moneys received as income during the pendency of the administration, did you not?

(Testimony of George Ferrari.)

A. What is that?

The Court: He wants to know, did you file income tax returns during the three years that this estate was pending, accounting for income of the estate.

A. Well, the accountant took care of all that.

The Court: Well, you recall that such returns were filed?

The Witness: Yes.

The Court: All right, go ahead.

Q. (By Mr. Gillard): And you signed at the end of 1946 or the early part of '47, you signed an income tax return for the estate of 1946, did you not?

A. I don't know; I guess so. I guess the accountant took care of that. I wouldn't—

Q. Do you recall signing any returns for income taxes during these years, Mr. Ferrari?

A. Well, taxes were always being paid. I don't know, I guess the accountant took care of that.

Q. You paid the taxes yourself each year as they came due, did you not, to the Internal Revenue service for income taxes?

A. On the estate? [201]

Q. For income taxes for the money earned by the estate during the time you were an executor?

A. I guess so. We always paid the taxes.

Q. You also paid taxes to the State of California for income taxes during the course of the administration of the estate, did you not?

A. Yes, I guess so.

(Testimony of Edward Ferrari.)

you if the signature on Sheet 21 of that return is yours—Edward Ferrari.

A. Yes, that's my signature.

Q. And do you recall when you signed that return?

A. It was sometime in the latter part of 1947.

Mr. Howard: I think that's all the questions I have [204] to ask the witness, your Honor. Oh, before you start, pardon me.

Q. (By Mr. Howard): Mr. Ferrari, did you know Paul Doyle?

A. No, I didn't know Paul Doyle.

Q. Did you ever have any contact with any personnel of the Internal Revenue Bureau during the administration of this estate? A. No.

Cross Examination

Q. (By Mr. Gillard): At the time you signed the return, Mr. Ferrari, were there a number of sheets involved in the document you signed?

A. There was a number of sheets at the time.

Q. Was the return similar in form to this carbon copy of a return in the estate of Luigi Ferrari? The color of the paper and the size of it?

A. It looked like it.

Q. At the time that you signed the return, did you look over the other sheets?

A. No, I didn't look over no sheets.

Q. Did you look at any page except the signature page? A. No, just signed it.

Q. Do you know of your own knowledge whether

(Testimony of Edward Ferrari.)

there was anything on that return except your signature after you finished signing it? [205]

A. Nothing.

Q. You didn't examine it to see? A. No.

Q. If the figures were in there? A. No.

Q. If the amount of the estate was specified or if the amount of the tax was specified?

A. No.

Q. Now about the same time did you sign that preliminary notice, this Exhibit D in front of you?

A. This preliminary notice, I don't recall signing the preliminary notice.

Q. You don't recall signing that at all?

A. No, I don't.

Q. Is that your signature on there?

A. Yes, that's my signature.

Q. Do you recall reading that document at the time you signed it?

A. No, don't recall signing it.

Q. Now at the time that you signed your name to the estate tax return, was there some discussion about an extension of time?

A. There was a discussion at the time.

Q. What was that discussion.

A. The discussion was that he was to get an extension on [206] the estate, because he didn't have much time left, and that he told us that the tax would be about a hundred thousand dollars, and we said, gee, it was quite a bit. We said we didn't have that kind of money in the estate account to pay, and he says, "Well, then you will

(Testimony of Edward Ferrari.)

have to probably dispose of some of the property in order to pay the tax." And we told him we didn't like to dispose of any of the property if we could help it, and then he says, "What you should do is,"—there were a lot of bills that were owing, and he said, "The thing to do is to clean up these outstanding bills and then when you are a little money ahead, we will see if we can arrange to go to the bank to make a loan. But in the meantime, when you do pay the tax, you are going to have to pay six percent interest.

Q. Now at the time he mentioned that he had to get—he didn't have much time left and he had to get an extension, an extension to do what, did he say?

A. He said that would be the—I understood the extension to pay the tax.

Q. Extension to pay the tax? A. Yes.

Q. Was there ever any discussion about an extension to file the return?

A. I don't remember any discussion on that.

Q. Did you ever ask him when the return was due? [207]

A. I never asked him whether or not the—when the return was due.

Q. Did you ever ask him if he got an extension to pay the tax?

A. Well, there was no understanding—

Q. Did you ever ask him?

A. No, I never asked him that.

(Testimony of Edward Ferrari.)

Q. Did you ever ask him if he got an extension to file the return?

A. I don't remember asking him that.

The Court: Did he ever tell you that he got an extension?

The Witness: He said he had got an extension.

The Court: What time? At what time?

The Witness: That is what I understood—an extension of the payment of the tax.

The Court: When did he tell you that?

The Witness: That was in '47.

The Court: Was that the same time that he talked about the extension?

The Witness: Yes, about the hundred thousand dollars. That is what I understood.

The Court: Well, you have just told us that in that conversation that you had with him, he said that he would have to get an extension because his time was running out.

The Witness: Well his time was running out, is what I [208] understood. But we didn't have the money to pay it at that time.

The Court: All right. Now did you have another conversation with him later in which he told you he had gotten an extension?

The Witness: Not that I remember.

The Court: Well, when did he tell you that he got the extension, the same conversation he told you he was going to get one?

The Witness: In 1947?

(Testimony of Edward Ferrari.)

The Court: Well, it is not clear to me. See if you can develop it.

Q. (By Mr. Gillard): Mr. Ferrari, you and your brother both appeared as witnesses in the criminal trials involving Mr. Cosgrove?

A. That's right, yes.

Q. At that trial Mr. Cosgrove was represented by Mr. Alioto? A. Yes.

Q. And at that time Mr. Alioto was also your attorney, was he not?

A. Well, he wasn't exactly our attorney. We talked to him about Cosgrove, about we had to pay the penalty.

Q. Wasn't Mr. Alioto your attorney in 1950, '51 and '52?

A. I don't know if he was our attorney. Mr. Howard later on talked to him. [209]

Q. Mr. Howard is in Mr. Alioto's office?

A. I think he was at that time.

Mr. Howard: If the Court please, at that time and at no time have I had any professional association with Mr. Olioto other than we share the overhead in the same suite of offices. I am not his partner, I am not associated with him, at any time within the course of this litigation.

Q. (By Mr. Gillard): Wasn't Mr. Alioto representing you at the same time he was representing Mr. Cosgrove?

A. Well, we went to Alioto at the time, Cosgrove told us to go down and see him.

Q. You went to Mr. Alioto? A. Yes.

(Testimony of Edward Ferrari.)

Q. About your affairs?

A. Well, about—yes, talked to us about, we had to pay a penalty.

Q. About the penalty? A. Yes.

Q. And you went to him as an attorney to represent you? A. We went to ask him.

Q. At that time he was involved and engaged in the defense of Mr. Cosgrove in the criminal action? A. He was.

Q. Now the very first time that this discussion ever came up or any discussion ever came up as to signing this return, the very first time it ever came up, did you say that you had [210] signed that return in October of 1947?

A. Which discussion do you mean?

Q. Any discussion with reference to your return, with Mr. Alioto, or with Mr. Cosgrove.

A. Yes, I told him we had signed it in '47.

Q. You told him that was the first time you ever asked about it? A. Mr. Alioto?

Q. Yes.

A. Told him we signed the estate tax papers in '47.

Q. You told him that? A. Yes.

Q. You told him you signed an estate tax return?

A. Similar to that effect, estate tax return.

Q. What do you mean, similar to that effect?

A. Well, I mean that that's what we understood it—I mean, the working, exactly.

(Testimony of Edward Ferrari.)

Q. You signed an estate tax paper, isn't that what you told him?

A. Estate tax paper, yes.

Q. And what you were referring to was that Exhibit B in front of you, weren't you—that preliminary estate tax notice?

A. I don't remember signing that.

Q. You don't remember that, signing that at all?

A. No.

Q. But you clearly remember signing the estate tax return at that time? [211]

A. There was a lot of pages to it, yes.

Q. You had, through your friend Mr. Demartini, some time in 1948,—you saw a return in the estate of Bocci, did you not?

A. No, I didn't talk to Fred Demartini.

Q. You didn't talk to Fred Demartini?

A. No.

Q. Did you ever see an estate tax return of Mr. Bocci?

A. No, I have never seen Mr. Bocci's estate tax return.

Q. In 1948 did you ask Mr. Cosgrove if he had filed an estate tax return?

A. I think it was in '48 some time that, when my brother had got the return from Fred Demartini, where he had seen the, about the fifteen months, we went back and we told Cosgrove and he says, "I know all about the fifteen months," he says. "You didn't have the money to pay, that's why you have to pay an interest when you pay the

(Testimony of Edward Ferrari.)

tax." He says, "As long as you haven't got the money to pay, you have to pay the tax, as long as you have one on file."

Q. Did you ask him about whether the return should be filed?

A. No, he asked us, he told us that he had one on file.

Q. He what?

A. Told us that he had one on file.

Q. He had one filed? A. Yes.

Q. He told you at that time? [212]

A. It was at that time.

Q. Did you so testify in the criminal trial that Mr. Cosgrove told you that?

The Court: Well, you will have to look at it. You can't just ask him.

Mr. Gillard: It is a negative, if the Court please.

The Court: Oh.

A. I don't remember if that's what I testified in the criminal trial. I don't know if I had answered that question, or—at that time.

Mr. Gillard: If the Court please, I don't wish to be off the record here, but my notes don't show anything about such a conversation, but in order to make the representation to the Court or be justified in offering the transcript of their testimony to show the negative that they did not so testify, I would have to further examine the record, and I don't know if I should.

The Court: That he did not testify?

(Testimony of Edward Ferrari.)

Mr. Gillard: That this statement was made, that the return had been filed. I gave you the answer that the brother made, but I don't have the note on this one.

Mr. Howard: I don't know what relevance it would have, unless he was actually asked the question.

The Court: Yes, it wouldn't have any legal effect, Mr. Gillard, unless, as Mr. Howard says, there was some direct [213] question along that line. If he wasn't asked the question, then of course he didn't testify to it. It is always primarily a question of negatives as to whether or not a question was asked, rather than what——

Mr. Gillard: I can't pick it up at this moment, so I will have to let it go.

The Court: All right.

Mr. Gillard: I have no further questions.

The Court: That's all?

Mr. Howard: No further questions.

The Court: That is all, sir. You may step down.

(Witness excused.)

The Court: Now is there any further testimony, Mr. Howard?

Mr. Howard: No further testimony.

The Court: Any further testimony in the Ferrari estate?

Mr. Gillard: Submitted, your Honor.

The Court: Now you want to make some statement about the matter, Mr. Howard?

(Whereupon counsel for the respective parties argued the matter before the Court, after which the following occurred.)

Mr. Gillard: If the Court will permit the reopening of this case, perhaps counsel will stipulate at the time the returns were filed, if each Mr. Ferrari were called to the stand, he would testify the only persons present in the room [214] were themselves and Mr. Cosgrove.

The Court: You don't mean when it was filed—when it was signed.

Mr. Gillard: I beg pardon. That the only persons present in the office were Mr. Cosgrove and the two Ferraris. Ruth Cosgrove was not there. That was the prior testimony in the criminal case.

Mr. Howard: I will stipulate that.

Mr. Gillard: All right.

The Court: We will submit the case, then, on that basis.

[Endorsed]: Filed April 17, 1956.

